No. 89-641

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD GARNETT, *et al.*

v.

RENTON SCHOOL DISTRICT NO. 403, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether, under the Free Speech and Free Exercise Clauses of the First Amendment, or the Equal Access Act, 20 U.S.C. §§ 4071-4074, public school officials may prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other student groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

2. Whether the Establishment Clause of the First Amendment requires public school officials to prohibit a voluntary, student-initiated, and student-led group of high school students from meeting in empty classrooms before or after school to engage in religious speech, when other student groups are allowed to meet for nonreligious purposes not directly related to the school curriculum.

PARTIES TO THE PROCEEDING

The parties include Petitioners Richard Garnett by and through his next friend Peggy Smith, Scott Germino, Robert Ryan by and through his next friend Jack Ryan, and Richard Tracy by and through his next friend Michael Tracy; and Respondents Renton School District No. 403, Robert L. Anderson, John G. Dubois, Marcia K. Holland and Margarita Prentice, in their official capacities as members of the school district board of directors, and Brian Barker and Gary Kohlwes, school district employees, in their official capacities.

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RENTON SCHOOL DISTRICT NO. 403, *et al.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, Richard Garnett, *et al.*, petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion (as twice amended) of the court of appeals (Pet. App. A) is reported at 874 F.2d 608. The opinion of the district court (Pet. App. D) is reported at 675 F. Supp. 1268.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1989, and amended on March 3, 1989, and again on May 15, 1989. The Court's order denying rehearing and suggestion of rehearing *en banc* (Pet. App. B) was entered on July 18, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

In addition to the First Amendment to the United States Constitution, this case involves the Equal Access Act, 20 U.S.C. §§ 4071-4074, which is set forth in full in Appendix E.

STATEMENT OF THE CASE

A. The Facts

Lindbergh High School ("LHS") is a 1,100-student public high school serving grades 9 through 12 within the Renton School District ("the school district"), which receives federal financial assistance and is located in Renton, Washington, a suburb of Seattle.

LHS provides opportunities for students to organize clubs to meet on school premises for discussion of topics of common interest. Stipulation to Facts ("Stip.") at 2, ¶¶ 5-6 (Exc. 3); Dep. of H. Kloes, pp. 18-19 (Exc. 212-13).[1]

The school district describes these student groups as "co-curricular," "not offered for credit toward graduation" but "providing a broad offering of purposeful learning experiences, some of which are more appropriately conducted outside of the approved curriculum of the District." School District Policy No. 6470 (Exc. 128). According to this written policy of the school district, these activities "shall ordinarily be conducted wholly or partly outside the regular school day and shall be available to students who voluntarily elect to participate."[2]

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[1] Citations to the Excerpt of Record submitted to the court of appeals will be denoted as "Exc." Citations to the Clerk's Record in the trial court are designated "CR."

[2] Student groups permitted to use school facilities within the District pursuant to this policy in the past have included a photo club, rocket club, chess club, arts and crafts clubs, Key (Kiwanis

Id. Participation in these clubs is not a prerequisite for graduation, nor does it confer credit towards graduation. In general, student members, not faculty members, plan club activities and no faculty instruction takes place. Deps. of H. Kloes, p. 41 (Exc. 219); J. Peterson, p. 4 (Exc. 221); D. Allen, p. 227 (Exc. 227). No faculty member tests or grades participation or performance in such club meetings. Deps. of G. Kohlwes, p. 19 (Exc. 208); H. Kloes, p. 41 (Exc. 219; CR 95). Twelve of fifteen clubs at LHS are not class-related in that club participation is not required as part of any class. Dep. of B. Barker (I), pp. 27-29, 42-44 (Exc. 186-88, 194-96). Nor is serving as a club advisor a part of the pedagogical function or job description of any faculty member. Deps. of J. Peterson, p. 4; D. Allen, p. 4; N. Greiner, p. 8 (Exc. 221, 225, 227, 230). Many of the faculty advisors for these clubs receive no stipend for monitoring the club meetings. Exhibit X to Dep. of B. Barker (Exc. 135; CR 95). The school district expressly stipulated that student clubs at LHS meet on school premises "during noninstructional time" and that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶¶ 5, 6 (Exc. 3).

Beginning in November 1984, petitioner Scott Germino, then a sophomore at LHS, met with principal Barker on several occasions to request permission to use school facilities during noninstructional time for meetings of a group of students to discuss religious and moral

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youth service) Club, SKY (Special Kiwanis Youth service) Club, ski club, golf club, and numerous other groups reflecting student interest. Renton School District Master Lists of Clubs, 1984-87 (Exc. 98-102). The "Master List" of approved student groups at the time petitioners commenced this litigation (the 1987-88 school year) included, *inter alia*, a chess club, a pep club, a bowling club, a ski club, a service club, a girls club, a varsity (lettermen's) club, a minority student club, an international club, and a dance club. Master List of Clubs, 1986-87 (Exc. 88-92).

issues, read the Bible, and pray. Barker denied these requests. Stip. at 2, ¶ 8 (Exc. 8); Affidavit of S. Germino, ¶ 3-5 (Exc. 39-40); Dep. of B. Barker (I), pp. 45-46 (Exc. 197-98). Since November 1984, the school district has repeatedly denied the students' request for permission to meet. *Id.* It is stipulated that the petitioner students' meetings would be entirely voluntary, student-initiated and student-directed, Stip. at 3, ¶ 11 (Exc. 4), and would not materially interfere with the orderly conduct of educational activities within LHS. Stip. at 3, ¶ 13 (Exc. 4). The students have never sought school endorsement or sponsorship of their discussions, nor have they asked the school district to assign a school employee to plan, lead, participate in, or even attend any of their voluntary meetings. Stip. at 3, ¶ 12 (Exc. 4); Dep. of B. Barker (I), pp. 45-46 (Exc. 197-98). The school district denied the students permission to meet because of the religious content of the students' intended speech and because of the school district's assertion that the students' meetings would not be curriculum-related, and would violate state and federal law. Stip. at 3, ¶ 10 (Exc. 4); Dep. of G. Kohlwes, pp. 25-26 (Exc. 210-11).

On September 18, 1987, the students and their parents brought suit in the United States District Court for the Western District of Washington under 42 U.S.C. § 1983 against the school district, its administrators and its board members (in their official capacities). Plaintiffs sought an injunction to enforce their constitutional rights to freedom of speech, free exercise of religion, freedom of association, and equal protection of the laws, as well as their statutory rights to "equal access" to a "limited open forum" under the Equal Access Act, 20 U.S.C. §§ 4071-4074.

B. The Decision of the District Court

In response to the Court's scheduling order, the parties agreed to the submission of deposition and affidavit testimony in lieu of trial testimony. The hearing on plain-

tiffs' motion for preliminary injunction was consolidated with trial on the merits.

On December 23, 1987, the district court dismissed the students' statutory claim for relief under the Equal Access Act, holding that the Act's mandatory open forum provisions were inapposite because of the school district's assertion that none of the clubs presently included on the Master List were "noncurriculum related" within the meaning of the Act. The Court cited "[t]he key point" to be "that none of the challenged clubs [meeting at LHS] is demonstrated to be student initiated and student directed and without sponsorship and substantial direction by the school through a faculty advisor or a teacher of a related course." Pet. App. 26a.[3]

As an alternative holding, the district court held that "[t]he EAA does not require the Renton School District to permit an unconstitutional use of school property" and under Washington law "meetings of religious groups on school premises would be unconstitutional. . . ." Pet. App. 34a, 35a. The court did not refer to this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), or *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), relying instead on the Second Circuit's pre-*Widmar* decision in *Brandon v. Board of Education of Guilderland Central Schools*, 635 F.2d 571 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981), holding that "a high school is not a public forum like a park where religious views can be freely aired."

Relying on *Brandon*, the district court rejected the students' free exercise and equal protection arguments on the basis that there was no "showing of a coercive effect

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[3] However, the parties have stipulated that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶ 6 (Exc. 3).

upon a particular religious ritual," because "[p]laintiffs' religious group is nondenominational" and because "all religious groups are treated the same." Pet. App. 36a, 37a.

C. The Decision of the Court of Appeals

Richard Garnett and the other LHS students appealed the district court's order denying their motion for preliminary injunction and entering judgment for the Renton High School District on the merits. By opinion filed January 17, 1989, the Ninth Circuit affirmed the judgment of the district court. The Ninth Circuit amended its opinion on March 3, 1989 and again on May 15, 1989.

The Ninth Circuit applied the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), to determine whether allowing the students' meeting on school grounds was consistent with the Establishment Clause. The Ninth Circuit held that arguably such an action might have a secular purpose, but that it would violate both the second and third prongs of the *Lemon* test. Pet. App. 8a.

The court of appeals expressly refused to follow this Court's analysis in *Widmar v. Vincent*, 454 U.S. 263 (1981), distinguishing it on the grounds that high school students were "less mature and more impressionable" than university students, and that student activities at LHS, unlike those in *Widmar*, were district-approved and supervised. Pet. App. 10a, 11a.

Addressing the students' First Amendment claims, the Ninth Circuit, relying on *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562 (1988), held that the students' free speech rights were not violated because the high school was not a First Amendment "limited public forum." The Court noted that "[d]istrict policy 6470 explicitly states that '[t]he Renton School District does not offer a limited open forum.'" Pet. App. 12a. Thus,

the Ninth Circuit said the district was free to exclude any club which it did not classify as an extension of its courses and programs. *Id.*

Finally, the Ninth Circuit held that the Equal Access Act did not apply because LHS did not have a "limited open forum" as defined by the Act. For the purposes of the Act, a high school has a limited open forum when "it grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The court of appeals accepted the school district's self-referential definition of a "noncurriculum related group," Pet. App. 14a, which gives school officials unlimited discretion to determine when the Act applies. The court reviewed the record and concluded: [L]indbergh and the school district have considered instructional goals, and, in accordance with a written policy, made the clubs [all except the petitioner's club] a part of Lindbergh's curriculum." Pet. App. 16a.

The students' motion for a rehearing and suggestion for rehearing *en banc* were denied on July 18, 1989.

REASONS FOR GRANTING THE WRIT

The petitioners have been prohibited by school officials from meeting for voluntary discussions in empty classrooms before or after school. Respondent school officials have stipulated that the petitioners' meetings would not disrupt the school environment or the school's educational mission. Stip. at 3, ¶ 13 (Exc. 4). They also have stipulated that other student clubs are permitted to meet on school premises "during non-instructional time" and that "[o]ne or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶¶ 5, 6 (Exc. 3). Respondents further admit that petitioners' meetings "are voluntary, student-initiated and student directed." Stip. at 3, ¶ 11 (Exc. 4). The school officials' sole basis

for refusing permission to petitioners is the religious content of the students' speech.

Under basic principles of the First Amendment, a content-based prohibition on speech activities is unconstitutional. *Widmar v. Vincent*, 454 U.S. 263 (1981); *see also Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). In *Widmar*, this Court held that a public university that makes facilities available to other student groups may not discriminate against religious student groups on the basis of the content of their speech, and rejected arguments that allowing a religious student group to meet would either endorse or entangle government with religion in violation of the Establishment Clause. The same principles ought to control in this case.[4]

Moreover, it is not necessary for this Court to address the constitutional rights of the students, for Congress has provided a statutory remedy designed for precisely this situation. After hearing reports of content-based restrictions on student religious speech in many school districts around the country, and following extensive

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[4] The court of appeals' reliance on *Hazelwood School District v. Kuhlmeier*, 108 S. Ct. 562 (1988) (Pet. App. B at 5185) is misplaced. *Hazelwood* involved a school-initiated, school-funded, faculty-directed high school newspaper, conducted as part of a course for which credit was given. 108 S. Ct. at 565. It has no application to student-initiated, student-directed speech that is unrelated to coursework or the official activities of the school. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969). The court of appeals' reliance on *McCollum v. Board of Education*, 333 U.S. 203 (1948) (Pet. App. 9a), is also misplaced. In *McCollum*, this Court held that a policy of allowing religious instructors to provide religious education to public school students on campus during the school day violated the Establishment Clause because it created the impression that the government was sponsoring religious education. *McCollum* did not hold, as the court of appeals imagined, that genuinely voluntary, student-initiated, and student-led activity before the commencement of the school day also violates the Establishment Clause.

hearings and reflective consideration of the constitutional issues involved, Congress overwhelmingly passed the Equal Access Act, 20 U.S.C. §§ 4071-4074. The Act prohibits public schools that receive federal financial assistance from denying students the opportunity to meet during noninstructional time on account of the "religious, philosophical, or political content of their speech," whenever the school has allowed "one or more" other student-initiated and student-run groups to meet for purposes that are "not directly related to the curriculum." 20 U.S.C. §§ 4071(a), (b), (c)(1), (c)(5) and 4072(3).

Under any objective definition of the key statutory term, "noncurriculum-related," the Equal Access Act applies to this case and respondent's content-based exclusion of petitioners' meeting is unlawful. But instead of enforcing the Act, the courts below effectively nullified the Act by accepting as "curriculum-related" essentially any activity the school officials declare to be so, even when it has only the most tenuous relation to coursework. According to the court of appeals, school officials have discretion in determining "what is and what is not curriculum related" (Pet. App. 14a, 15a). The officials' standard of curriculum-relatedness, approved by the courts below, is as follows:

> The public high school curriculum, for that matter the curriculum of a school district, is the educational program which consists of all of those programs, whether they be academic or nonacademic, which give effect to the mission of the school district as decided by the local board of directors.
>
> * * * *
>
> Beyond that then, the curriculum is what the local school board says it is.

Pet. App. 24a, 25a (quoting Baumgartner Dep. at 6, 8). Acceptance of this definition renders the Act a dead letter. If the "curriculum" includes anything the school officials deem to be part of their "mission," then the Equal Access

Act is only precatory language. School officials will be free to discriminate against any speech they happen to disfavor.

The definition accepted by the courts below disregards the language, legislative history, and purposes of the Equal Access Act. The Act defines the term "meeting" as an activity of a student group that is not "*directly related* to the school *curriculum*." 20 U.S.C. § 4073(3) (emphasis added). It does not define the term as any activity tangentially related to the school's "mission." Senator Hatfield, the principal Senate sponsor, described "curriculum related" groups as those that are "really a kind of extension of the classroom," giving as examples a "French club or a Spanish club where they get together to talk nothing but that language." 130 Cong. Rec. S8342 (daily ed. June 27, 1984). Indeed, as the district court noted (Pet. App. 25a), congressional drafters originally used the term "nonschool-sponsored," but changed the term to "noncurriculum related" precisely out of the fear that school officials could frustrate the intent of the Act by deeming all student clubs to be sponsored by the school except those it would discriminate against. According to the sponsors of the legislation, the definition of "noncurriculum related" should be "fairly broad." 130 Cong. Rec. at S8342 (statements of Senators Gorton and Hatfield). By contrast, the lower courts' approach renders this category a null set. The court's definition is so subjective that compliance with the Act becomes effectively voluntary.[5]

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[5] In rejecting the Ninth Circuit's legal position, the Eighth Circuit observed:

> Allowing such a broad interpretation of "curriculum-related" would make the EAA meaningless. A school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal. At the same time the administration could arbitrarily deny access to school facilities to any unfavored student club

Moreover, the court of appeals erroneously held that "the district *must* exclude organized religious speech because use of public school facilities for religious purposes violates the Establishment Clause." Pet. App. 13a (emphasis in original). This holding demonstrates a profound misunderstanding of the nature of constitutional protections for freedom of religion. Under this Court's precedents—most notably, *Widmar v. Vincent*—the government does not violate the Establishment Clause when it extends access to its facilities to a broad range of activities, among them religious speech. The record in this case, the congressional findings based on similar circumstances elsewhere, and this Court's decision in *Widmar* all demonstrate that providing equal access for religious and nonreligious extracurricular groups creates neither the appearance nor the reality of government control or endorsement. As the Eighth Circuit held in *Board of Education of Westside Community Schools v. Mergens*:

> "The language of the EAA closely tracks the holding of the Court in *Widmar*. In fact, the only difference between the EAA and *Widmar* is the EAA's express extension of the equal access principle to public secondary school students. Any constitutional attack on the EAA must therefore be predicated on the difference between secondary school students and university students. We reject this notion because Congress considered the difference in the maturity level of secondary students and university students before passing the EAA. We accept Congress' factfinding.

867 F.2d 1076, 1080, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597). The Establishment Clause exists to pre-

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on the basis of its speech content. This is exactly the result that Congress sought to prohibit by enacting the EAA. A public secondary school cannot simply declare that it maintains a closed forum and then discriminate against a particular student group on the basis of the content of the speech of that group.

Board of Education of Westside Community Schools v. Mergens, 867 F.2d 1076, 1078, *cert. granted*, 109 S. Ct. 3240 (1989) (No. 88-1597); 130 Cong. Rec. H 12271.

vent the government from initiating and endorsing religious activities; it places no constraint on the freedom of individuals to initiate and engage in religious activities, even on government property.

Although the Court in *Widmar* had no occasion to decide whether the equal access principle it enforced at the university level would apply to high school students (454 U.S. at 270 n.14), the author of the *Widmar* opinion, Justice Powell, and three other Justices subsequently concluded that it would. *Bender v. Williamsport Area School District*, 475 U.S. 534, 551-557 (1986) (dissenting opinions). Justice Powell wrote: "I do not believe—particularly in this age of massive media information—that the few years difference in age between high school and college students justifies departing from *Widmar*." *Id.* 556-557. After extensive investigation into the question, Congress reached the same conclusion when it passed the Equal Access Act. S. Rep. No. 357, 98th Cong., 2nd Sess. 34-36 (1984).

This case raises important questions of law that have frequently recurred in school districts all over the nation and divided the courts of appeals. In recent years, this Court has twice granted petitions for certiorari in substantially similar cases, and presently has under review a decision by the Eighth Circuit in direct conflict with this case. *Board of Education of Westside Community Schools v. Mergens, supra.*[6] *See also Bender*, 741 F.2d 538 (3d Cir. 1984), 475 U.S. 534 (1986) (certiorari granted on constituitonal question; judgment vacated on jurisdictional grounds). Both the Eighth Circuit in *Westside* and the Third Circuit in *Bender* concluded, on facts similar to those in this case, that the schools had established a limited open forum and were under a presumptive constitutional (in *Bender* and *Westside*) or statutory (in *West-*

[6] The Eighth Circuit specifically cited and disapproved the holding of the court of appeals in this case. 867 F.2d at 1080 n.3.

side) obligation to extend equal access to students who wish to meet for voluntary, student-initiated, and student-directed religious discussions. In another case involving student political speech, the Third Circuit held that a school district created a limited open forum under the Equal Access Act by allowing a student-initiated volleyball marathon in the boys' gymnasium.[7] On the other hand, the Third Circuit in *Bender*, along with the Second, Fifth, and Eleventh Circuits,[8] have held that to allow students to meet on school premises during noninstructional time for religious discussions would violate the Establishment Clause. These decisions have created so much uncertainty about the law that school officials in many parts of the country, including respondents, have mistakenly concluded that they are legally required to deny access to religious student groups on threat of lawsuits. Decisions like the one below have placed school officials in the difficult position of censoring student speech and creating conflict with students who are respectful, law-abiding, and studious. Moreover, as Congress noted in passing the Equal Access Act, the sheer cost of litigation caused by this legal uncertainty is a wasteful drain on

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[7] *Student Coalition for Peace v. Lower Merion School*, 776 F.2d 431 (3d Cir. 1985).

[8] *Brandon v. Board of Education*, 635 F.2d 971 (2d Cir. 1980), *cert. denied*, 454 U.S. 1123 (1981); *Lubbock Civil Liberties Union v. Lubbock Independent School District*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983); *Nartowicz v. Clayton County School District*, 736 F.2d 646 (11th Cir. 1984). The *Bender* case may be distinguishable because the students sought to meet during an activity period, which was part of the school day. The precise holding in *Lubbock* is unclear. The decision could be limited to school districts with a past history of religious activity. *See* 640 F.2d 424, 426 (5th Cir. 1982) (denial of petition for rehearing *en banc*) (Reavley, J., dissenting) (dissenting judges uncertain as to scope of panel's decision). In *Nartowicz*, the decision was not on the merits, but solely a review of an order granting a preliminary injunction.

education resources. S. Rep. No. 357, 98th Cong., 2nd Sess. 21 (1984).

The parties to this case developed a full trial record, on the basis of which this Court can resolve both the statutory and constitutional issues.[9] This case would therefore serve as a valuable supplement to the *Westside* case, and assist this Court in reaching a definitive judgment on these important issues. Should this Court decide to set this case for argument with *Westside*, counsel for petitioners are willing to commit to an expedited briefing schedule so that the Court's calendar would not be seriously disrupted.

This Court has the opportunity in *Westside* and this case to develop clear legal standards for the guidance of school officials, students, and lower courts in equal access controversies. If this Court were to affirm *Westside* but deny this petition, it would perpetuate the present state of legal confusion, as students and school officials throughout the nine states of the Ninth Circuit and elsewhere would be left to the unedifying task of further hair-

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[9] At trial, petitioners submitted by stipulation in lieu of live testimony the depositions (including digests) of the faculty advisors of nine extracurricular clubs at Lindbergh High School, the principal, superintendent, and deputy superintendent for instruction, the affidavits of the petitioner students, as well as the deposition of the school district's expert on curriculum. In addition, petitioners submitted the constitutions of 11 Lindbergh student clubs, the school district's Master List of authorized student groups for the past three years, the list of active Lindbergh clubs in the student handbook, the list of extracurricular student activities for which faculty advisors receive or do not receive stipends, as well as extensive materials describing Lindbergh's extracurricular program that grants graduation honors for voluntary community service by students through religious and political organizations. Finally, the record at trial also included an extensive set of stipulated facts, including the stipulation that "one or more of said student clubs are student-initiated, significantly student-directed, and student participation therein is voluntary." Stip. at 2, ¶ 6 (Exc. 3).

splitting litigation to discover distinctions between the nearly indistinguishable facts of these two cases. On the other hand, if this Court affirms the Eighth Circuit's decision in *Westside* on the merits, it would be appropriate to grant this petition, vacate the judgment below, and remand for reconsideration in light of the *Westside* decision.

CONCLUSION

For these reasons, the Court should grant the petition for certiorari in this case and either set it for argument with *Board of Education of Westside Community Schools v. Mergens*, No. 88-1597, or, if appropriate after the decision in *Westside*, vacate the judgment below and remand for reconsideration by the court of appeals.

Respectfully submitted,

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89-641

No.

Supreme Court, U.S.
FILED
OCT 16 1989
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

RICHARD GARNETT, *et al.*

v.

RENTON SCHOOL DISTRICT NO. 403, *et al.*

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-3552

D.C. No. C87-1249

RICHARD GARNETT, by and through his next friend, Peggy Smith; SCOTT GERMINO; ROBERT RYAN, by and through his next friend, Jack Ryan; RICHARD TRACY, by and through his next friend, Michael Tracy,

Plaintiffs/Appellants,

v.

RENTON SCHOOL DISTRICT NO. 403; ROBERT L. ANDERSON, in his official capacity; BRIAN BARKER, in his official capacity; JOHN G. DUBOIS, in his official capacity; MARCIA HOLLAND, in her official capacity; DONALD JACOBSON, in his official capacity; GARY F. KOHLWES, in his official capacity; and MARGARITA PRENTICE, in her official capacity,

Defendants/Appellees.

UNITED STATES OF AMERICA,

Plaintiff-Intervenor/ Appellant.

Appeal from the United States District Court
for the Western District of Washington
Walter T. McGovern, District Judge, Presiding

Argued and Submitted
October 6, 1988—San Francisco, California
Filed January 17, 1989
Amended March 3, 1989
Second Amended May 15, 1989

Before: Jerome Farris and Cecil F. Poole, Circuit Judges, and Robert J. Kelleher,* District Judge.

ORDER AND SECOND AMENDED OPINION

Opinion by Judge Farris

Steven T. McFarland, William H. Ellis, Jr., Michael E. Ritchie, Ellis & Li, Seattle, Washington, Robert Hale, Families for Responsible Educational Environment, for the plaintiffs-appellants Richard Garnett, et al.

I. Franklin Hunsaker, Scott M. Stickney, Christopher A. Rycewicz, Bullivant, Houser, Bailey, Pendergrass & Hoffman, Portland, Oregon, for the defendants-appellees Renton School District No. 403, et al.

John R. Bolton, Assistant Attorney General, Gene S. Anderson, United States Attorney, Brant M. Laue, Special Assistant to the Attorney General, Anthony J. Steinmeyer, United States Department of Justice, Washington, D.C., for the amicus curiae United States.

Marc D. Slonim, Ziontz, Chestnut, Varnell, Berley & Slonim, Seattle, Washington, for the amicus curiae American Civil Liberties Union of Washington Foundation.

---

* Honorable Robert J. Kelleher, Senior United States District Judge, for the Central District of California, sitting by designation.

R. Broh Landsman, Helsell, Fetterman, Martin, Todd & Hokanson, Seattle, Washington, for the amici curiae Anti-Defamation League of B'Nai B'rith, the American Jewish Congress, and Americans for Religious Liberty.

Martin L. Ziontz, Bassett & Morrison, Seattle, Washington, for amici curiae American Jewish Committee and Church Council of Greater Seattle.

ORDER

The opinion filed January 17, 1989, and amended March 3, 1989, is further amended as follows.

Delete the two paragraphs on pages 1660-1661 of the amended slip opinion beginning with "The Act's requirements . . ." and ending with ". . . violates the Constitution." In place of those paragraphs, insert the following:

The Act's requirements only apply to high school which have a limited open forum. Because Lindbergh does not have a limited open forum as defined by the Act, the Act's requirements do not apply. For the Act's purposes, a high school has a "limited open forum" when it "grants an offering to or opportunity for one or more non-curriculum related student groups to meet on school § 4071(b). The Act does not define "noncurriculum related group."

In evaluating whether the Renton School District allows "noncurriculum related groups" to meet at Lindbergh, we respect the district's determinations about which activities are curriculum related. Complete de novo review of every school district decision as to what is and what is not curriculum related would invite litigation from every student group denied a classroom for one reason or another, and is not necessary to effectuate the goals of the Act. Courts have always afforded school districts broad discretion in the management of school affairs, limited, of course, by any applicable constitutional or statutory principles. *See, e.g., Hazelwood,* 108 S. Ct. at 571;

Board of Educ. v. Rowley, 458 U.S. at 207-08 (1982). The Equal Access Act does not expressly depart from this principle of deference to the judgment of local school officials. Congress must, therefore, be understood to have legislated in light of this principle. The legislative history supports this interpretation. During debate, Senator Hatfield, a sponsor of the legislation, made clear that the Act in no way seeks to limit a school district's authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum related activities. 130 Con. Rec. S8342 (Daily ed. June 27, 1984).

While we accord some deference to a school district's determination about whether a group is curriculum related, we cannot completely defer to a school district's determination. Complete deference would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related. As the district court correctly recognized, " 'a limited open forum should be triggered by what a school does, not by what it says.' " *Garnett v. Renton School Dist. No. 403*, 675 F. Supp. 1268, 1273 (W.D. Wash. 1987) (quoting 130 Cong. Rec. S8341 (daily ed., June 27, 1984) (statement of Sen. Leahy)).

After independently reviewing the record, we agree with the district court's conclusion that all clubs at Lindbergh are related to the school's curriculum. The activities allowed to meet at Lindbergh are supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed "noncurriculum related." None of Lindbergh's clubs is student initiated or student directed. All of the clubs are sponsored by and substantially directed by the school through a faculty advisor or a teacher of a related course. Lindbergh has not merely deemed all its clubs to be curriculum related. Rather, Lindbergh and the school district have

considered instructional goals, and, in accordance with a written policy, made the clubs a part of Lindbergh's curriculum.

Lindbergh does not allow "noncurriculum related" groups to meet on its premises during noninstructional time; the Equal Access Act does not apply. Because the Equal Access Act does not apply to this case, we need not decide whether the Act violates the Constitution.

OPINION

FARRIS, Circuit Judge:

Richard Garnett and other Lindbergh High School students sought a district court order requiring the Renton School District to allow their student religious groups to meet in a high school classroom prior to the start of the school day. The students appeal the district court's orders denying their motion for a preliminary injunction and entering judgment for the school district on the merits. The students claim: 1) the First Amendment requires that the school district permit their group to meet; and 2) the Equal Access Act requires that the school district permit their group's meetings.

FACTS

Lindbergh High School is a public secondary school in the Renton School District. The district makes classrooms available during noninstructional time for use by students participating in approved "co-curricular" activities. The district's board of directors and superintendent determine whether to approve an activity based on District Policy 6470 which provides:

> [t]he criteria to be used for approving co-curricular activities should include but not be limited to:

1. the purposes and/or objectives shall be an extension of a specific program or course offering,

2. the activity shall be acceptable to the community,

3. the activity should have carry-over values for lifetime activities,

4. the group shall be supervised by a qualified employee,

5. The cost of the activity must not be prohibitive to student or District,

6. the activity must comply with Title IX requirements,

7. the activity must take place on school premises unless approved in advance by the school principal, and

8. the activity must not be secretive in nature.

Policy 6470 also states that the district "does not offer a limited open forum."

Garnett and others asked Lindbergh's principal and the school district for permission to use a Lindbergh classroom for weekday morning meetings of their non-denominational Christian student group. The group wished to discuss religious and moral issues, read the Bible, and pray. The principal and the district denied the group's requests because the club was not curriculum related and because allowing the proposed meetings would violate the Establishment Clause.

Members of the Christian group brought suit in U.S. District Court and moved for a preliminary injunction requiring the district to allow them to use a classroom for meetings. The district court denied the students' motion for a preliminary injunction and entered judgment in favor of the school district.

STANDARD OF REVIEW

This appeal involves questions of law which are reviewed *de novo*. *United States v. McConney*, 728 F.2d 1195, 1201 (9th Cir.), *cert. denied*, 469 U.S. 824 (1984). Application of the Equal Access Act involves a "mixed question" of application of law to facts. The district court's application of the Act is not the sort of "essentially factual" inquiry which warrants application of the deferential clearly erroneous standard to a "mixed question." *Id.* at 1202 (citing *Pullman-Standard v. Swint*, 456 U.S. 273, 288 (1982). Rather, application of the Act requires "the consideration of legal principles," *id.* at 1204, of statutory interpretation and constitutional law, and is therefore subject to the general rule that "mixed questions will be reviewed independently." *Id.* The district court's findings concerning underlying historical facts, however, are reviewed for clear error. *See Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986).

I. THE FIRST AMENDMENT

A. The Establishment Clause

The Establishment Clause of the First Amendment, applied to the states through the Fourteenth Amendment, *Cantwell v. Connecticut*, 310 U.S. 296 (1940), prohibits state action "respecting an establishment of religion." U.S. Const. amend. I. The Supreme Court has applied the three-part "*Lemon* test" to determine whether state action comports with the Establishment Clause. First, the action must have a secular purpose. Second, the action's primary effect must be one that neither advances nor inhibits religion. Third, the action must not result in excessive entanglement of government with religion. *Edwards v. Aguillard*, 107 S. Ct. 2573, 2577 (1987) (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971)).

1. Secular Purpose

Allowing the requested meeting of this particular student religious group in a public high school classroom at a time closely associated with the school day would violate the Establishment Clause. We recognize that such an action might arguably have the secular purpose of allowing equal access to school facilities. *See Brandon v. Board of Educ. of Guilderland Central School Dist.*, 635 F.2d 971, 978-79 (2d Cir. 1980). But it would also violate the Establishment Clause under both the second and third parts of the *Lemon* test. It would have the primary effect of advancing religion, and it would foster government entanglement with religion.

2. Primary Effect of Advancing or Inhibiting Religion

The second part of the *Lemon* test evaluates whether state action merely neutrally accommodates religion or unconstitutionally sponsors religion. Government may accommodate religious practices to avoid impinging on the right to freely exercise religious beliefs. *Brandon*, 635 F.2d at 975 (2d Cir. 1980). Thus, government need not withhold generally available benefits from a religious organization simply because the organization is religious. *Roemer v. Board of Public Works*, 426 U.S. 736, 746-47 (1976).

Government may not, however, take actions which even appear to sponsor religion. Thus, even insignificant amounts of direct aid to religious groups violate the Establishment Clause. In *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947), the Supreme Court held: "[no] tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion." Nowhere has the Supreme Court been more vigilant in prohibiting the appearance of state sponsorship of religious activities than in public elementary and secondary schools.

> The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students' emulation of teachers as role models and the children's susceptibility to peer pressure. . . . "The public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools."

Edwards v. Aguillard, 107 S. Ct. at 2577-78 (citations omitted).

Permitting this student religious group to meet in a public high school just before the start of classes would impermissibly advance rather than neutrally accommodate religion. In *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203 (1948), the Supreme Court held that a school district impermissibly advanced religion by allowing religious instructors to provide religious education to students on a voluntary basis during the school day. The Court held: "This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment." *Id.* at 210. This case presents substantially the same issues as *McCollum*. Although the religious activity proposed would take place before formal instruction begins, it would occur in a tax-supported classroom at a time when most students must be at school. The problems addressed in *McCollum* are equally present.

Other circuits considering use of school facilities for religious meetings have held such use to unconstitutionally advance religion. In *Brandon v. Board of Educ.*, 635 F.2d 971 (2d Cir. 1980), the court held that permitting prayer meetings in a public high school, even under a neutral equal access policy, would impermissibly advance religion. The court stressed the appearance of school sponsorship that would arise:

> Our nation's elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an impressionable student, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is too dangerous to permit.

Id. at 978. *See also Bell v. Little Axe Indep. School Dist.*, 766 F.2d 1391 (10th Cir. 1985); *Nartowicz v. Clayton County School Dist.*, 736 F.2d 646 (11th Cir. 1984); *Bender v. Williamsport Area School Dist.*, 741 F.2d 538 (3d Cir. 1984), *vacated on other grounds*, 106 S. Ct. 1326 (1986); *Lubbock Civil Liberties Union v. Lubbock Indep. School Dist.*, 669 F.2d 1038 (5th Cir. 1982), *cert. denied*, 459 U.S. 1155 (1983) (each holding that allowing student religious meetings during noninstructional time in a public secondary or elementary school would constitute an impermissible advancement of religion). We agree.

Widmar v. Vincent, 454 U.S. 263 (1981), held that permitting a student religious group to meet on a university campus which had a policy of allowing meetings of a wide range of student groups would not impermissibly advance religion. This case is different from *Widmar*. As the Supreme Court recently noted, "[t]he potential for undue influence is far less significant with regard to college students who voluntarily enroll in courses [than with regard to students at public high schools]. 'This distinction warrants a difference in constitutional results.'" *Edwards v. Aguillard*, 107 S. Ct. at 2577 n.5 (quoting *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 253 (Brennan, J. concurring)).

Unlike university students, high school students are required to attend school. The instructional format at a high school is far more structured than at a university. High school students are less mature and more impressionable than university students. Teachers at high schools, unlike college professors, are both educators and

authority figures. The same considerations that mandate special vigilance in preventing religious establishments in public schools—the impressionability of young students, compulsory attendance laws that make students a captive audience, and the role of public schools in inculcating democratic ideals—distinguish public secondary schools from public universities. The religious activity proposed in this case, which would take place at a time closely associated with a highly structured school day, would be far more likely to appear to enjoy school sponsorship than a group on a college campus. In addition, all student activities in the Renton School District, unlike those in *Widmar*, are district approved and supervised by district employees. Since *Widmar*, other circuit courts which have considered voluntary prayer groups in public elementary and secondary schools have recognized the difference between universities and public schools. They have uniformly held that public school prayer groups violate the Establishment Clause. *See Lubbock*, 669 F.2d at 1045-46; *Bender*, 741 F.2d at 552; *Bell*, 766 F.2d at 1404-05.

3. Entanglement

If the government must engage in continuing supervision of religious activity, church and state become excessively entangled. *Brandon*, 635 F.2d at 979; *Collins v. Chandler Unified School Dist.*, 644 F.2d 759, 762 (9th Cir.), *cert. denied*, 454 U.S. 863 (1981). Both *Brandon* and *Collins* held that faculty supervision of religious activities at a public school creates excessive entanglement of government and religion. In this case, because the district is responsible for student safety and discipline, Lindbergh teachers must supervise all student activities, religious or otherwise, taking place at the school. This necessary supervision could lead to teacher interference with or advocacy of religious activities. Although *Widmar* held that allowing a religious group to meet on a university campus did not present entanglement concerns, the student groups allowed to meet in *Widmar*, unlike

those in the present case, did not need supervision or monitoring by government employees.

B. Student Free Speech Rights

The Renton School District's refusal to allow a student religious group to meet on campus does not violate the free speech clause of the First Amendment.

Lindbergh High School is not a First Amendment limited public forum. In *Hazelwood School Dist. v. Kuhlmeier*, 108 S. Ct. 562, 568 (1988), the Supreme Court held:

> school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," . . . or by some segment of the public, such as student organizations. . . . "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse." *Cornelius v. NAACP Legal Defense & Educational Fund, Inc.*, 473 U.S. 788, 802 (1985).

The Renton School District has not by either policy or practice opened its classrooms for indiscriminate use. District Policy 6470 explicitly states that "[t]he Renton School District does not offer a limited open forum." The district's policy is to allow use of its facilities by student groups only after those groups are approved according to narrowly circumscribed guidelines. The district's practice does not vary from its policy. Student groups are allowed to meet in high school classrooms only after express district approval. The school district has not intentionally opened its classrooms for public discourse by students and student groups.

Because the district has not created a public forum, it may limit student expression in any reasonable way. *Id.*

(citing *Perry Educ. Ass'n v. Perry Educators' Ass'n*, 460 U.S. 37, 47 (1983)). Policy 6470 is not unreasonable on its face. It does not discriminate on an impermissible basis, nor is it irrational. Nor do we find that the district has been disingenuous in its application of the policy. Clubs which are an extension of the courses and programs of the district are permitted to meet. Clubs, such as the religious group in this case, which have nothing to do with the school district's educational mission are not granted district approval.

The district's exclusion of religious groups from its co-curricular program is not only reasonable, but also constitutionally required. The district *must* exclude organized religious speech because use of public school facilities for religious purposes violates the Establishment Clause. "[W]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." *Collins*, 644 F.2d at 763 (quoting *Brandon*, 635 F.2d at 980).

The holding in *Widmar v. Vincent* is not to the contrary. *Widmar* held that the free speech clause prohibits exclusion of a religious group from a public forum on a university campus. The differences between high schools and universities distinguish this case from *Widmar*. Even were we to accept the dubious proposition that the holding in *Widmar* applies to public high schools, *Widmar* would not apply here. The classrooms at Lindbergh High School, unlike the facilities considered in *Widmar*, are not a public forum for student expression.

Tinker v. Des Moines Indep. Community School Dist., 393 U.S. 503 (1969) is also inapplicable. The *Hazelwood* Court explained:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different

> from the question whether the First Amendment requires a school affirmatively to promote particular student speech.

Hazelwood, 108 S. Ct. at 569. Lindbergh has not prohibited students from discussing religion at school. Rather, the school district has refused to grant a group the use of its classrooms and other resources. *Tinker* is also inapplicable because the Establishment Clause concerns present in this case were not present in *Tinker*.

II. APPLICABILITY OF THE EQUAL ACCESS ACT

The Equal Access Act, 20 U.S.C. § 4071, makes it unlawful for

> any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

The Act's requirements only apply to high schools which have a limited open forum. Because Lindbergh does not have a limited open forum as defined by the Act, the Act's requirements do not apply. For the Act's purposes, a high school has a "limited open forum" when it "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). The Act does not define "noncurriculum related group."

In evaluating whether the Renton School District allows "noncurriculum related groups" to meet at Lindbergh, we respect the district's determinations about which activities are curriculum related. Complete de novo review

of every school district decision as to what is and what is not curriculum related would invite litigation from every student group denied a classroom for one reason or another, and is not necessary to effectuate the goals of the Act. Courts have always afforded school districts broad discretion in the management of school affairs, limited, of course, by any applicable constitutional or statutory principles. *See, e.g., Hazelwood*, 108 S. Ct. at 571; *Board of Educ. v. Rowley*, 458 U.S. at 207-08 (1982). The Equal Access Act does not expressly depart from this principle of deference to the judgment of local school officials. Congress must, therefore, be understood to have legislated in light of this principle. The legislative history supports this interpretation. During debate, Senator Hatfield, a sponsor of the legislation, made clear that the Act in no way seeks to limit a school district's authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum related activities. 130 Cong. Rec. S8342 (Daily ed. June 27, 1984).

While we accord some deference to a school district's determination about whether a group is curriculum related, we cannot completely defer to a school district's determination. Complete deference would render the Act meaningless because school boards could circumvent the Act's requirements simply by asserting that all student groups are curriculum related. As the district court correctly recognized, "a limited open forum should be triggered by what a school does, not by what it says.'" *Garnett v. Renton School Dist. No. 403*, 675 F. Supp. 1268, 1273 (W.D. Wash. 1987) (quoting 130 Cong. Rec. S8341 daily ed., June 27, 1984) (statement of Sen. Leahy)).

After independently reviewing the record, we agree with the district court's conclusion that all clubs at Lindbergh are related to the school's curriculum. The activities allowed to meet at Lindbergh are supervised by

faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed "noncurriculum related." None of Lindbergh's clubs is student initiated or student directed. All of the clubs are sponsored by and substantially directed by the school through a faculty advisor or a teacher of a related course. Lindbergh has not merely deemed all its clubs to be curriculum related. Rather, Lindbergh and the school district have considered instructional goals, and, in accordance with a written policy, made the clubs a part of Lindbergh's curriculum.

Lindbergh does not allow "noncurriculum related" groups to meet on its premises during noninstructional time; the Equal Access Act does not apply. Because the Equal Access Act does not apply to this case, we need not decide whether the Act violates the Constitution.

CONCLUSION

Allowing a student religious group to hold meetings in a public secondary school classroom at a time closely associated with the school day would violate the Establishment Clause. The school district's refusal to approve a student religious group as a district activity is, therefore, not only reasonable, but required. Because Lindbergh High School does not have a "limited open forum" as defined by the Equal Access Act, the Act's requirements do not apply.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CA No. 88-3552

DC No. C87-1294
(Western Washington)

RICHARD GARNETT, by and through his next friend, Peggy Smith; SCOTT GERMINO; ROBERT RYAN, by and through his next friend, Jack Ryan; RICHARD TRACY, by and through his next friend, Michael Tracy,

Plaintiffs/Appellants,

v.

RENTON SCHOOL DISTRICT No. 403; ROBERT L. ANDERSON, in his official capacity; BRIAN BARKER, in his official capacity; JOHN G. DUBOIS, in his official capacity; MARCIA HOLLAND, in her official capacity; DONALD JACOBSON, in his official capacity; GARY F. KOHLWES, in his official capacity; and MARGARITA PRENTICE, in her official capacity,

Defendants/Appellees,

UNITED STATES OF AMERICA,
Plaintiff-Intervenor/ Appellant.

ORDER

[Filed July 18, 1989]

Before: FARRIS and POOLE, Circuit Judges, and KELLEHER,* District Judge.

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* Honorable Robert J. Kelleher, Senior United States District Judge, for the Central District of California, sitting by designation.

The panel has voted to deny appellants' petition for rehearing. Judges Farris and Poole have voted to reject the suggestion for rehearing en banc and Judge Kelleher recommends rejection.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. That request was later withdrawn.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX C

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

Case Number: C87-1294M

RICHARD GARNETT, *et al*,
Plaintiffs,

v.

RENTON SCHOOL DISTRICT #403, *et al*,
Defendants.

JUDGMENT IN A CIVIL CASE

[Filed Dec. 28, 1987]

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☐ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the hearing on Motion for Preliminary Injunction having been consolidated with trial on the merits, and the Court, after hearing evidence on factual issues in the cause, having denied Plaintiffs' Motion for Preliminary Injunction, Judgment is hereby entered in favor of the Defendants.

December 28, 1987
Date

BRUCE RIFKIN
Clerk

(*By*) /s/ John A. McLellan
JOHN A. MCLELLAN
Deputy Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C87-1294M

RICHARD GARNETT, *et al.*,
Plaintiffs,

v.

RENTON SCHOOL DISTRICT NO. 403, *et al.*,
Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

[Filed Dec. 23, 1987]

INTRODUCTION

Three Lindbergh High School students and one former student are the Plaintiffs in this case. The Complaint states that Defendants' refusal to permit a student-initiated and led fellowship group (whose purpose is to discuss the Bible and its application to student issues and to offer prayer, support, and encouragement to each other) to meet at the high school as other groups do violates (1) the Equal Access Act, (2) the First Amendment—freedom of speech, free exercise of religion, freedom from state hostility toward religion under the establishment clause; and (3) equal protection, due process and reciprocal guarantees of the Washington State Constitution.

Plaintiffs have been meeting off campus in a church which is "immediately adjacent to the Lindbergh High School campus, directly across the parking lot." (Affidavit of Brian Barker at 5.)

Plaintiffs pray for an order enjoining defendants, *inter alia*, from refusing to permit them to conduct meetings of their club on school premises during noninstructional time, and for a declaration of their rights under the United States Constitution and the Equal Access Act (EAA) and that Defendants have created a "limited open forum" for purposes of the applicability of the EAA.

Accepting that Plaintiffs have no adequate remedy at law because constitutional rights are allegedly violated, the likelihood of Plaintiffs' success on the merits must be analyzed together with the issue of irreparable harm if the requested relief is or is not granted. *See, e.g., People of Village of Gambell v. Hodel*, 774 F.2d 1414, 1419 (9th Cir. 1985). The moving party must demonstrate some combination along the continuum represented by the extremes of either (1) probable success on the merits and irreparable injury or (2) serious questions are raised and the balance of hardships tips sharply in its favor. *See, e.g., Regents of the University of California v. ABC, Inc.*, 747 F.2d 511, 514-15 (9th Cir. 1984); *Benda v. Grand Lodge of the International Ass'n of Machinists*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979).

BALANCE OF HARDSHIP

The matter of hardship will be considered first. Plaintiffs allege that the mere deprivation of constitutional rights for even minimal periods of time constitutes irreparable injury, *Elrod v. Burns*, 427 U.S. 347, 373 (1976), and they also contend "stigmatization" from being banned from school facilities because of the content of their speech.

On the other hand, Defendants contend that to grant Plaintiffs their requested injunctive relief would force them into violating the Establishment Clause of the U.S. Constitution as well as the Washington State Constitution, Article I, Section 11, which provides:

> No public money or property shall be appropriated for or applied to any religious worship, exercise, instruction, or the support of any religious establishment . . . .

And Article IX, Section 4, which provides:

> All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

Thus, Plaintiffs allege harm from deprivation of Constitutional rights while Defendants argue harm in being forced to violate constitutional rights should injunctive relief be granted. The balance of hardships appears, therefore, to be in equipoise. Thus, whether injunctive relief ensues depends upon who is more likely to succeed on the merits.

LIKELIHOOD OF SUCCESS ON THE MERITS

Summary Conclusion

The relief prayed for by Plaintiffs must be denied because

(1) Plaintiffs have not created a "limited open forum" for purposes of applicability of the EAA;

(2) Even if a "limited open forum had been created, the EAA by its own terms cannot operate to require activity prohibited under Washington State's Constitution (Article I, Section 11 and Article IX, Section 4);

(3) The Court need not, therefore, address the constitutionality of the EAA under the United States Constitution;

(4) Plaintiffs' rights under the U.S. Constitution of free speech, association, and exercise of religion are not infringed.

Plaintiffs' Contentions and EAA Provisions

Plaintiffs contend that Defendants are violating the Equal Access Act (EAA) by refusing to treat their student-initiated religious group the same as other student-initiated groups. Under the EAA, a school having a "limited open forum" may not deny access to school premises for meetings by noncurriculum-related, student-initiated groups on the basis of the religious content of the speech at such meetings. The Act explains that a "public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). Even if there were no EAA, argue the Plaintiffs, their constitutional rights of free speech, freedom of association, and free exercise of religion are being infringed when the school prohibits the group from meeting on the premises.

Whether the EAA applies under the facts in this case must first be determined. To answer that question, it must be determined whether Lindbergh High School has a "limited open forum," that is, whether noncurriculum-related student groups have been granted "an offering or opportunity" by the school to meet on school premises during noninstructional time. The statute provides that

> (c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—
>
> (1) the meeting is voluntary and student-initiated;

> (2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

20 U.S.C. § 4071 (items 3-5 omitted as not pertinent).

Plaintiffs contend that Lindbergh High School has a "limited open forum" because student groups permitted to meet on campus includes the following 15 clubs: Bowling Club, Dance Squad, Distributive Education Club of America (DECA), Diversified Occupations Club of America (DOCA), Future Business Leaders of America (FBLA), International Club, LIMITS Club (Lindbergh Modern Insight & Technology Society), Minority Student Union, Ski Club, SKY Club (Special Kiwanis Youth), Vocational Industrial Clubs of America (VICA), Chess Club (Advanced Strategy & Tactics Club), Girls Club, Pep Club ("Spirit Connection"), and Varsity Club.

Plaintiffs and Defendants submit different standards or criteria for determining what clubs are curriculum related. The statute does not define "noncurriculum related groups," but it does provide that if certain other indicia are present as to a "noncurriculum related" group, the school will be deemed to "offer a fair opportunity" for such student group to meet and, thus, trigger the Act: part (c) at (1) and (2) provides that the meeting be voluntary and student initiated and that there be no sponsorship of the meeting by the school, the government or its agents or employees.

All 15 of the challenged clubs are sponsored by the school district; indeed, they comprise part of the curriculum of the school:

> The public high school curriculum, for that matter the curriculum of a school district, is the educational program which consists of all of those programs, whether they be academic or nonacademic, which give effect to the mission of the school district as decided by the local board of directors.

(Bumgarner Deposition at 6). Dr. Bumgarner is presently Assistant Superintendent for Curriculum Instruction for Bethel School District and worked for 9 years for the State Superintendent of Public Instruction where he was curriculum director. (*Id.* at 4.) He also explains that Washington is a "local control" state, meaning that each of the 296 school boards of directors decides the school curriculum for its district, observing minimum graduation requirements and specific course offerings required by state law. "Beyond that then, the curriculum is what the local school board says it is." (Bumgarner Deposition at 8.) Dr. Bumgarner explains that nonacademic activities tend to "hook a student's interest into the school via some other things they are interested in" and they then "tend to do better in all of school." (Bumgarner Deposition at 11.) In determining whether to make a particular nonacademic club part of the curriculum, among other things, student interest and availability of local facilities are considered. Thus, ski clubs are typically included in the curriculum and a bowling club might be if there were bowling lanes nearby and student interest.

There was concern in Congress that a school could frustrate the intent of the Act by deeming all student clubs to be sponsored by the school except those it would discriminate against such as religious clubs. Congress changed the test employed by the Act from "nonschool sponsored" to "noncurriculum related." Plaintiffs thus argue that if the school district permits the meeting of clubs that are student initiated, the Act is triggered. Professor Laurence Tribe addressed this issue before Congress and stated:

> I would imagine that nonschool sponsored groups does not mean groups that are not recognized in any way by the school. It simply means groups whose formation is not initiated or substantively directed, or endorsed by school authorities, so that I would

> imagine that the reference in the statute to non-school sponsored groups would include clubs that are student initiated, but presumably not things like honor societies that represent an official extension of school policy.

(Hearings on the Religious Speech Protection Act: Hearings on H.R. 4996, before the Subcommittee on Elementary, Secondary and Vocational Education of Committee on Education and Labor, House of Representatives, 98th Cong. 2d Sess. § 52 (1984); see Exhibit B to Plaintiff's Trial Memorandum.) The key point is that none of the challenged clubs is demonstrated to be student initiated and student directed and without sponsorship and substantial direction by the school through a faculty advisor or a teacher of a related course. It is not a case that Lindbergh has simply deemed student clubs to be sponsored; instructional goals have been considered by the Renton School District in making the clubs part of its curriculum.

Both Plaintiffs and Defendants cite legislative history, particularly the exchange between Senators Gorton and Hatfield. The entire colloquy between Senators Gorton and Hatfield reflects specific concerns of Senator Gorton about the operation of the Act: when the application of the Act is triggered what authority the school district has to determine what is curriculum related and what is not, and whether there are any effective limits to the kind of organizations that can be permitted in a public school with a "limited open forum". Senator Hatfield agreed that once a school has said yes to a student-initiated, noncurriculum-related group that would like to meet on school premises during noninstructional time, the requirement of the Act would go into effect. 130 Cong. Rec. S 8342 (daily ed., June 27, 1984).

> Mr. HATFIELD: . . . The school says, in effect, "We are going to have a student activities period or a period for noninstructional activity, and stu-

dents who have voluntarily initiated a request in which they want to associate themselves," that school says, "Yes, you may use the school facility before or after school for that purpose."

Once the school has established that, all this amendment says is you cannot dictate the content of the forum.

Mr. GORTON: Once it allows one such group, it must allow other groups, under the so-called equal access.

(*Id.*)

Senator Gorton's inquiry then turned to the question of determining what groups are curriculum related:

Mr. GORTON. Let me ask the Senator this question: What about the high school football team? Is it a noncurriculum-related student group?

Mr. HATFIELD. It is curriculum-related because that is how they can use tax dollars. The coaches are hired by the school administration. It is the department of physical education in which they teach health classes, courses within the curriculum. The athletic teams are curriculum-related. That is how we govern them in terms of antidiscrimination legislation as well because they are part of that body.

Mr. GORTON. Would the school district have the full authority to determine where the line is to be drawn between curriculum-related activities and noncurriculum-related?

Mr. HATFIELD. We in no way seek to limit that discretion.

Mr. GORTON. So if the school district were to determine that the girls cheerleading squad, for example, should be led by a teacher, it could make the determination that it was curriculum-related.

Mr. HATFIELD. Correct.

> Mr. GORTON. And, therefore, the existence of that group would not be a nonrelated [sic] forum?
>
> Mr. HATFIELD. Correct.
>
> Mr. GORTON. Could the school make the same determination with reference to a chess club?
>
> Mr. HATFIELD. I would not say that no school district could, but I cannot readily conceive of a criterion that could be used at this time to establish that as a curriculum-related activity. I am not saying it could not be, because as long as you have lawyers, they can find ways of doing things one way or another.
>
> Mr. GORTON. They could, I take it, determine to be curriculum-related a drama club putting on a play?
>
> Mr. HATFIELD. They could, yes, because you have courses in high school now in the arts, various and sundry arts, for instance, the school orchestra. The school band would come out of the music department. You have the other cultural activities including, as the Senator pointed out, the drama club.

130 Cong. Rec. S 8342 (daily ed., June 27, 1984). This exchange manifests the idea that the degree to which a variety of possible student groups may be related to the curriculum varies along a continuum; thus, for example, a math club would be directly related to the body of mathematics courses within a curriculum, while a chess club would be more tenuously related to the mathematics curriculum.

A school board, such as Renton's, may determine that there is high student interest in a chess club, that it would be a good companion to a mathematics course, that such a club meets instructional goals, and as a result adopt it as part of the curriculum. The process of designing a curriculum of academic and nonacademic elements to meet educational objectives and foster student interest in the school and its courses of study is the prerogative

of educators with their expertise and circumspection. Districts will vary in their curricula; wealthier districts may offer more courses and related activities; rural districts will offer activities catering to different interests than will urban districts. Whether or not to allow a student group with no faculty support to meet on school premises is a different kind of decision than design of a curriculum. The challenged clubs became part of Lindbergh High School's program through curriculum design and are part of the fabric of course offerings.

Senator Leahy spoke of the importance of what a school actually does in distinction to the school's formal decision about whether to have a limited open forum:

> The point is that a limited open forum should be triggered by what a school does, not by what it says. The careful wording of the current draft will protect both religious and secular interests because it speaks with clarity about what a limited open forum means.

U.S. Cong. Rec. S 8341 (daily ed., June 27, 1984).

It appears that both the formal decision on curriculum and the actions of Renton School District and Lindbergh High School demonstrate that a "limited open forum" is neither desired nor tolerated. Lindbergh's school district does not wish to create a "limited open forum" because it does not wish to run afoul of the Washington State Constitution. While Renton School District has developed a curriculum that includes certain nonacademic activities, these activities are important elements of the curriculum. As demonstrated by the deposition testimony of Dr. Bumgarner, Principal Barker, and others, moreover, the challenged activities are directly or closely related to course work or have a delegated administrative function.

Because the curriculum in Washington schools including Lindbergh High School, includes academic courses as well as selected nonacademic activities, the challenged activities—part of the curriculum—do not trigger the EAA.

Moreover, these activities are supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs that they cannot reasonably be termed "noncurriculum related" nor voluntary and student-initiated and without school sponsorship or direction.

The Washington Constitution and the EAA

Senator Leahy stated his belief in the lofty accomplishment made by the Equal Access Act:

> The equal access amendment we propose today makes an important statement about ideas. It says that ideas are sacred to Americans, whether or not they concern religion. It says that student-initiated religious groups have the same rights to meet on school property during noninstructional time as any other groups. And it says that secular student groups have no greater—or lesser—rights than do religious groups.
>
> This amendment sets forth common-sense rules to guide schools in opening their doors to these noncurriculum groups in a manner that stresses fairness and equity, yet in a manner that does not allow through indirection what would never be permitted directly—the sponsorship or the appearance of sponsorship of religion by our public schools.

130 Cong. Rec. S 8341 (daily ed., June 27, 1984). Thus, the EAA seeks to provide a constitutional means for public schools to allow religious as well as secular groups to use school premises, so long as there is no school sponorship of a religious group initiated by students. The question then becomes whether the neutral operation of a law that would bring religious clubs onto school premises—albeit without school sponsorship or teacher supervision or assistance—nevertheless would appear to create an impermissible atmosphere of religious partisanship.

The answer in Washington State is yes. The mandatory provisions of the EAA may not be applied in Washington State to permit religious organizations to meet on school premises owing to provisions of this state's constitution and relevant case law construing their application. The Washington Constitution "requires a far stricter separation of church and state than the federal constitution . . . ." *Witters v. Commission for the Blind*, 102 Wn. 2d 624, 626, 689 P.2d 53 (1984), *rev'd sub nom on other grounds, Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). Two provisions of the state constitution prohibit the relief requested here. Article I section 11 denies religious groups any use of public money or property:

> No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment.

Article IX section 4 expressly forbids any sectarian influence in the public schools:

> All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence.

The amicus curiae memorandum of the Anti-Defamation League of the B'nai B'rith (ADL) presents a well organized and cogent discussion of Washington law persuasive of the conclusion that Plaintiffs' requested relief is prohibited because it would (1) tend to introduce sectarian influence into Lindbergh High School and (2) would result in an impermissible appropriation of public money or property for religious worship or exercise. First, the prohibition of sectarian influence or control is absolute under Article IX, section 4:

> While the establishment clause broadly condemns any law "respecting an establishment of religion," our constitution specifically demands that no public funds

> be used to maintain or support any school which is under sectarian control or influence. There is no such thing as a 'de minimis' violation of Article 9, section 4. Nor is a violation of this provision determined by means of a balancing process. The words of Article 9, section 4 mean precisely what they say: *the prohibition is absolute.*

(Citations omitted, emphasis supplied.) *Weiss v. Bruno*, 82 Wn.2d 199, 206, 509 P.2d 973 (1973). *Weiss* concerned state tuition assistance whereby the student recipient could choose to attend schools with or without religious sponsorship. Because a portion of the grant funds went to students attending parochial school, the Washington Supreme Court held the program unconstitutional, stating:

> Any use of public funds that benefits schools under sectarian control or influence—regardless of whether that benefit is characterized as "indirect" or "incidental"—violates this provision.

82 Wn.2d at 211. The Court further held:

> Const. art. 9, § 4 does not provide that a minimal amount of sectarian control or influence is permissible. We cannot say that any of these schools is completely free from such influence.

82 Wn.2d at 228. ADL argues, and the Court agrees that if Bible study groups are allowed to meet on school premises during the school day, Lindbergh High School will no longer be *completely free* from sectarian influence:

> *Plaintiffs*, who by filing this suit have demonstrated drive, initiative and deep religious feelings, undoubtedly will have substantial influence within the school. Article IX section 4 prohibits all sectarian influence in the public schools, no matter how slight. The considerable influence that plaintiffs' religious group is likely to have in Lindbergh High School is not permitted by the state constitution.

ADL Memorandum at 7. The proscription of "influence" as well as "control" by sectarian elements was a conscious decision:

> It is indisputable that this more restrictive clause was the deliberate design of the framers of our constitution. The statehood compact with the United States required that provision be made for a public school system free from sectarian *control* . . . . Obviously not satisfied with the broader concept of control, the authors of our constitution added the words "or influence." A motion to strike those words failed.

(Emphasis in original, citations omitted.) 82 Wn.2d at 206.

Second, the ban on the use of public funds for religious purposes is—like the ban of influence and control by sectarian elements—absolute and without exception. That there is also no de minimus appropriation of money or property for a religious purpose is demonstrated by *Perry v. School District No. 81*, 54 Wn.2d 886, 344 P.2d 1036 (1959). There, a program permitting students to be released from school for religious study off school premises was held unconstitutional because (1) the program was announced on school bulletin boards and (2) the school distributed cards on which students could express interest in participating in the program. This use of school facilities and personnel to distribute the cards constituted an impermissible "use of school facilities supported by public funds for the promotion of a religious program." *Id.* at 896.

Similarly, a program permitting public school students to receive academic credit for religious study outside the school system was declared unconstitutional in *State Ex. Rel. Dearle v. Frazier*, 102 Wash. 369, 173 P. 35 (1918) because the expenditure of time by public school teachers to determine the number of credits to give students for

independent religious studies would constitute an appropriation of funds for religious instruction in violation of Article I section 11 no matter how small the expenditure of time by the teachers or how slight, indirect, or consequential the benefit to religion.

ADL reasons from the above cases and the Court agrees:

> Plaintiffs here ask for much more substantial public support than was held unconstitutional in *Perry* or in *Frazier*. Plaintiffs seek to hold their meetings on public school property, a direct and unambiguous "application of property" for religious worship or exercise. The use of school personnel to supervise religious clubs for compliance with the federal Equal Access Act and the use of bulletin boards or other common areas of the school to advertise religious club meetings are all uses of public personnel or public funds to support religion. Each is as substantial as the use of school facilities for announcements or the distribution of cards in *Perry* or the use of teacher time in *Frazier* to determine credit for outside religious study.

ADL Memorandum at 9. Finally, ADL contends that a bright line demarcation of church and state, as provided in Washington's constitution, is the surest approach to maintaining separation of these entities; there can be no tolerance for sectarian influence no matter how slight.

The conclusion is unavoidable that if Plaintiffs were to obtain their requested relief, the meetings of their religious club on school premises would amount to at least a slight benefit to religion, a benefit that is prohibited by Washington's Constitution.

The EAA does not require the Renton School District to permit an unconstitutional use of school property. The EAA by its own terms does not force Renton School District No. 403 and Lindbergh High School "*to sanction*

meetings that are otherwise unlawful; . . . or to abridge the constitutional rights of any person." 20 U.S.C. § 4071 (d), (5), (7) and under Washington's Constitution, meetings of religious groups on school premises would be unconstitutional because such meetings would introduce sectarian influences into the school and because they would result in an impermissible appropriation or public money on property for a religious purpose.

It is, therefore, unnecessary to determine the constitutionality of the EAA under the U.S. Constitution as the EAA's mandatory provisions have not been triggered and likely will not be triggered in Washington State because the Washington Constitution implicitly demands that no school allow a "limited open forum" to exist if it means religious clubs may use school premises. Religious groups are thus prevented from receiving implied state approval and from receiving incidental benefits from the state.

While the EAA may not have been intended to favor religious groups, the intended neutral application of the EAA would nevertheless result in impermissible sectarian influence (however slight) and impermissible appropriation of public funds (however small) were a school district to create a "limited open forum" and allow student religious organizations to meet on school premises. Although some religious organizations might welcome the impression of state sponsorship of their student clubs and the easy access to potential converts that the school setting might provide, as stated by the ADL,

> [t]here is no good reason why religious groups *must* meet on the school premises, during the school day, and under school supervision:
>
> 1. Any student can pray to himself anytime and anyplace;
>
> 2. Students can informally congregate and pray or discuss religion at school during free time;

3. There are innumerable churches, homes, offices and other private and public facilities students can use to meet during non-school hours;

4. Students can obtain released time if required for religious worship;

5. Students can elect to go to private religious schools.

ADL Memorandum at 2, 3.

Free Exercise, Free Association, Free Speech, Equal Protection, and Due Process Rights

The constitutional rights that Plaintiffs claim are violated by the school's refusal to allow their religious club to meet on campus are bound together in this context where the concept of religious freedom and its relationship to the operation of a governmental institution come together. *Brandon v. The Board of Education of the Guilderland Central School District*, 635 F.2d 971 (2d Cir. 1980) has addressed these issues. Free exercise infringement involves a showing of a coercive effect upon a particular religious ritual, *id.* at 976; no such showing is made here. Plaintiffs' religious group is nondenominational (see, Germino Affidavit, ¶ 15). Plaintiff's free exercise rights are not infringed, as the balance between religious speech and the constitutional values of neutrality toward religion and separation of church and state is properly struck. Permitting religious club meetings on school premises would have violated the Washington State Constitution. Avoidance of this conflict with the Washington Constitution is a "compelling state interest." Plaintiffs are not precluded entirely from religious meetings in being denied the use of school facilities; they have been meeting in a church across the parking lot from the school.

In *Brandon*, the plaintiff's free speech, association and equal protection arguments were unavailing as they are

here. The court pointed to two significant factors: a high school is not a public forum like a park where religious views can be freely aired, and the Establishment Clause limits the right to air religious doctrines. *Id.* at 980.

As to equal protection and due process concerns, a religious group must be treated differently than others because of the Establishment Clause and especially because of the provisions in the Washington Constitution; moreover, all religious groups are treated the same.

CONCLUSION

The 15 challenged clubs at Lindbergh High School are nonacademic activities that are elements of the official curriculum and are closely related (some more than others) to specific academic courses. The activties are substantially directed and supervised by faculty members. Some of the activities are required with course work and thus are not voluntary, none have been shown to be student initiated (although their existence indicates a certain level of student interest), and all are decidedly school sponsored. Lindbergh High School has not, therefore, created a "limited open forum" under the Equal Access Act, which would require it to allow all noncurriculum-related, student-initiated, nonschool sponsored groups—including Plaintiffs' religious club—to meet on school premises during noninstructional time.

Even if Lindbergh High School had created a "limited open forum," and even with the neutral operation of the EAA allowing students to meet on school premises but without school sponsorship, under Washington's constitutional law such meetings would (1) tend to introduce sectarian influence into Lindbergh High School and (2) would result in an impermissible appropriation of public money or property for a religious purpose. The EAA itself provides that a state need not break its own laws in order to observe EAA requirements.

Lindbergh High School's refusal to permit Plaintiffs to conduct meetings on school premises is proper, and neither Plaintiff's free exercise, free association, free speech, equal protection, nor due process rights have been infringed. Religious groups must be treated differently because of Establishment Clause concerns and restrictive provisions in Washington's Constitution.

Plaintiffs are not, therefore, entitled to the injunctive relief that would allow their religious group to meet on Lindbergh High School premises.

There being no likelihood that Plaintiffs would succeed on the merits, their motion for preliminary injunction is DENIED.

The Clerk of the Court shall direct uncertified copies of this Order to counsel of record.

DATED this 23rd day of December, 1987.

/s/ Walter T. McGovern
WALTER T. MCGOVERN
United States District Judge

APPENDIX E

APPENDIX D

THE EQUAL ACCESS ACT
(20 U.S.C. § 4071, *et seq.*)

* * *

DENIAL OF EQUAL ACCESS PROHIBITED

Sec. 4071. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open froum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

Notwithstanding the availability of any other remedy under the Constitution or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

Sec. 4072. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

Sec. 4073. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION

Sec. 4074. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this subchapter.

APPENDIX F

CONGRESSIONAL RECORD

[U.S. SEAL]

Proceedings and Debates of the 98th Congress,
Second Session

Vol. 130 No. 134—Part III
Washington, Thursday, October 11, 1984

EQUAL ACCESS GUIDELINES

Mr. BONKER. Mr. Speaker, as the House sponsor of the recently enacted Equal Access Act, I would like to join my colleague and coauthor, the gentleman from Pennsylvania [Mr. GOODLING], in presenting the Equal Access Guidelines to Congress. These guidelines should prove to be of great value to school administrators, teachers, and students in interpreting and implementing the Equal Access Act. In essence, the act establishes a policy of nondiscrimination with respect to the treatment of student groups, including student religious groups, which wish to meet during noninstructional time at public secondary schools.

Although the Equal Access Act generated much controversy, groups which participated on both sides of the debate worked together to hammer out these guidelines. Like the Equal Access Act itself, the guidelines are the product of compromise and I would like to commend these groups for putting aside their differences to develop this much needed document.

The guidelines are especially important because there is no congressional report for the final version of the legislation, which was added as an amendment to the Emergency Math/Science Education Act. Already, my office has been contracted by numerous school officials and other interested parties concerning specific features of

the act. These guidelines provide practical answers to the questions raised by the new law.

I would be remiss if I did not acknowledge the work of the Education and Labor Committee under the leadership of the late Carl Perkins from Kentucky. Without Chairman Perkins' parlimentary skill and determination, this legislation would not have been enacted. I would also like to commend the gentleman from Pennsylvania [Mr. GOODLING] for his leadership on the other side of the aisle. As a former schoolteacher, principal, school board president, and school superintendent, he brought special knowledge and experience to the equal access debate and I concur with his remarks, which follow, concerning the Equal Access Act.

Mr. GOODLING. Mr. Speaker, as a coauthor of the Equal Access Act, I am pleased to place in the RECORD, with the gentlemen from Washington [Mr. BONKER] guidelines for implementing the Equal Access Act that were drafted jointly by leading outside proponents and opponents of the law. These groups should be commended for putting their differences behind them once the law passed and working together to provide an agreed upon explanation of the act for school administrator. The text of these guidelines is entirely the product of these outside groups—not the congressional drafters of this act. We did, however, take the liberty of deleting a few misplaced statutory citations.

As these guidelines suggest, the Equal Access Act imposes only one basic requirement on school administrators. Student initiated religious groups must receive the same treatment as other student-initiated groups. Beyond this, subsection c of the act suggests ways to comply with this basic requirement and subsection d of the act identifies certain potentially troublesome actions that

are not authorized—or prohibited— by the act, but nothing is subsections c and d of the act are stated as requirements. School administrators are left free to determine how the equal access requirement can best be fulfilled in their school. As a former school administrator, I have great faith in the ability of school administrators to fairly implement the equal access requirement within the spirit of religious accommodation underlying the act.

We would like to reiterate that these guidelines are intended as an explanation and do not reflect the official position of the Congress or the U.S. Government.

THE EQUAL ACCESS ACT GUIDELINES

The organizations listed below were all involved with The Equal Access Act in the 98th Congress. Some actively supported the bill. All are deeply interested in seeing the equal access concept implemented in the secondary schools of America in accordance with law.

After consideration over a 2-year period, the Equal Access Act became law on August 11, 1984, passing the Senate 88 to 11 and the House 337 to 77. The final version reflects the usual give and take of the legislative process. This brief explanation of the act is designed to help school administrators, teachers, and student groups who must live under the act in real school situations to understand what this new legislation means. For your convenience the Equal Access Act—Title VIII of Public Law 98-377—follows:

TITLE VIII—THE EQUAL ACCESS ACT

SHORT TITLE

SEC. 801. This title may be cited as "The Equal Access Act".

DENIAL OF EQUAL ACCESS PROHIBITED

SEC. 802. (a) It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

(b) A public secondary school has a limited open forum whenever such school grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time.

(c) Schools shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum if such school uniformly provides that—

(1) the meeting is voluntary and student-initiated;

(2) there is no sponsorship of the meeting by the school, the government, or its agents or employees;

(3) employees or agents of the school or government are present at religious meetings only in a nonparticipatory capacity;

(4) the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school; and

(5) nonschool persons may not direct, conduct, control, or regularly attend activities of student groups.

(d) Nothing in this title shall be construed to authorize the United States or any State or political subdivision thereof—

(1) to influence the form or content of any prayer or other religious activity;

(2) to require any person to participate in prayer or other religious activity;

(3) to expend public funds beyond the incidental cost of providing the space for student-initiated meetings;

(4) to compel any school agent or employee to attend a school meeting if the content of the speech at the meeting is contrary to the beliefs of the agent or employee;

(5) to sanction meetings that are otherwise unlawful;

(6) to limit the rights of groups of students which are not of a specified numerical size; or

(7) to abridge the constitutional rights of any person.

(e) Notwithstanding the availability of any other remedy under the Constitutoin or the laws of the United States, nothing in this title shall be construed to authorize the United States to deny or withhold Federal financial assistance to any school.

(f) Nothing in this title shall be construed to limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary.

DEFINITIONS

SEC. 803. As used in this title—

(1) The term "secondary school" means a public school which provides secondary education as determined by State law.

(2) The term "sponsorship" includes the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting.

(3) The term "meeting" includes those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum.

(4) The term "noninstructional time" means time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends.

SEVERABILITY

SEC. 804. If any provision of this title or the application thereof to any person or circumstances is judicially determined to be invalid, the provisions of the remainder of the title and the application to other persons or circumstances shall not be affected thereby.

CONSTRUCTION

SEC. 805. The provisions of this title shall supersede all other provisions of Federal law that are inconsistent with the provisions of this title.

Approved August 11, 1984.

The congressional intent in passing The Equal Access Act was to develop legislation that respects both the Establishment Clause and the Free Exercise and Free Speech Clauses of the First Amendment, so that secondary school students may organize meetings. While Congress recognized the constitutional prohibition against state-sponsored religious activities in public schools, it also believed that student-initiated speech, including religious speech, should not be excised from the school environment. At the same time, Congress affirmed that it is local school boards and administrators who have the right and responsibility to implement equal access in conformity with the Act and the Constitution. Moreover, in passing The Equal Access Act, Congress did not intend to prohibit any activity that is otherwise constitutional.

The title—The Equal Access Act—explains the essential thrust of the Act. There are three basic precepts.

The first basic precept is equal treatment. If a public secondary school permits student groups to meet for student-initiated activity not directly related to the school curriculum, it is required to treat all such student groups equally. This means the school cannot discriminate against any students conducting such meeting "on the basis of the religious, political, philosophical, or other content of the speech at such meetings." Sec. 802(a). This language was used to make it clear that religious speech was to receive equal treatment, not preferred treatment.

The second basic precept is protection of student-initiated and student-led meetings. With respect to religious activities in the public schools, the Supreme Court has held unconstitutional state-initiated and state-sponsored religious activities. (This Act leaves the "school prayer" decisions undisturbed.) The Court has not ruled on student-initiated and student-led religious activities that are not state-sponsored by merely given equal access with other non-curiculum related student activities.

The third basic precept is preservation of local control. The Act does not limit the authority of the school to maintain order and discipline or to protect the well-being of students and faculty. It only marginally limits other authority to make policy about student meetings.

While the Act does not specifically cover every situation, an understanding of the three basic precepts of the Act should be a sufficient guide in addressing most situations.

Here are some questions and answers which indicate how the Act is intended to work:

(1) Q. What is meant by "limited open forum"? See 802(a) and (b).

A. A limited open forum is created when a secondary school provides an opportunity during "noninstructional time" for students to organize meetings to discuss subject matter not directly related to the school curriculum and permits those meetings on school premises. The forum created is said to be "limited" because it is only the school's own students who can take advantage of the open forum. Outsiders are not granted any independent right of access by The Equal Access Act.

(2) Q. Does a school have to provide a limited open forum for students?

A. No. The school or local policy-making body has the exclusive authority to determine whether it will create or maintain a limited open forum. If a school has a limited open forum, it may not discriminate against a student group because of the content of its speech. If a school does not have a limited open forum, the request of a single student group to organize a meeting or a club which is not directly related to the school curriculum requires the school to determine whether it wants to create such a forum.

(3) Q. What are "secondary schools"?

A. The Act explicitly states that this question is to be answered with reference to state law. Sec. 803(1).

(4) Q. Do meetings of curriculum related student groups trigger implementation of The Equal Access Act?

A. No. Only allowing meetings of noncurriculum related student groups triggers implementation of the Act.

(5) Q. What is meant by "noncurriculum related student groups"? Sec. 802(b).

A. A noncurriculum related student group is a group or club which is interested in a subject matter not directly related to the school curriculum. The math club, the Spanish club, the drama club and athletic teams

would normally be curriculum related. A religious club, political club or service club would be considered non-curriculum related.

(6) Q. Who determines which student groups are curriculum related?

A. Local school authorities. However, a school cannot defeat the intent of The Equal Access Act by some all-encompassing definition that arbitrarily results in all but one or a few student clubs being defined as curriculum related.

(7) Q. When can noncurriculum related student groups meet?

A. A limited open forum requiring equal access may be established during "noninstructional time." Sec. 802 (b). The Act defines "noninstructional time" as time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends. Sec. 803(4). It includes time before an individual student's school day begins or after it ends even though other students may be receiving classroom instruction at the time because of split, staggered or flexible school schedules. Thus students whose school day has not begun or has already ended may meet together, although other students' school day has already begun or has not yet ended.

(8) Q. Can noncurriculum related student groups meet during the school day?

A. The Act neither requires nor forbids a limited open forum for noncurriculum related student clubs during the instructional day. The constitutionality of equal access for religious clubs during the school day is currently being litigated in the Federal courts.

(9) Q. May a school establish regulations for meetings which take place in its limited open forum?

A. Yes. The Act does not take away a school's authority to establish time, place and manner regulations

for its limited open forum. For example, it may establish a reasonable time period on any one school day, a combination of days, or all school days. It may assign the rooms in which student groups can meet. It can enforce order and discipline in the meetings. The key is that regulations must be uniform and nondiscriminatory.

(10) Q. Can a school require a minimum number of students to form a noncurriculum related club?

A. Not if it "limit[s] the rights of groups of students." Sec. 802(d)(6). Care must be exercised that the school not discriminate against numerically small student groups which wish to establish a club by setting a requirement of a minimum number or students to form a club. The key is to be flexible in dealing with small student groups and to accommodate student groups that want to meet. For example, one teacher could monitor several small student groups meeting in a large room.

(11) Q. Should a school formulate a written policy for the operation of a limited open forum?

A. If a school decides to create a limited open forum or if such a forum already exists, it is strongly recommended that a uniform set of regulations be drawn up as soon as possible and be made available to administrators, teachers, students and parents. The importance of having such a document will become clearly evident if the school either denies a student group the opportunity to meet or is forced to withdraw that opportunity. When the rules are known in advance, general acceptance is easier to obtain.

(12) Q. What does "student-initiated" mean? Sec. 802(c)(1).

A. "Student-initiated" is one of the key precepts of the Act. It means the students themselves are seeking permission to meet and will direct and control the meeting. It means that neither a teacher or other employee

of the school nor the school itself is initiating the meeting. Further, nonschool persons may not direct, conduct or control student meetings. School authorities may take reasonable steps to assure compliance with these provisions. These provisions do not mean that students are forbidden to seek advice from nonschool persons.

(13) Q. May teachers be present during student meetings?

A. Yes, but there are limitations. For insurance purposes or by local policy or state law, teachers are commonly required to be present during student meetings. In order to avoid any taint of state sponsorship of religion, teachers or employees are to be present at student religious meetings only in a "nonparticipatory capacity." Sec. 802(c)(3). The Act also prohibits teachers or other school officials from influencing the form or content of any prayer or other religious activity. Although the Act could literally be read as prohibiting teacher participation in all clubs, it is doubtful that Congress intended that result. Congress did not intend to prohibit teacher participation in nonreligious student meetings. Thus, for example, a teacher could participate in the chess club or the Future Teachers of America. A school, under the Act, could prohibit teacher participation in political clubs because of the possibility of undue influence.

(14) Q. May outsiders attend a student meeting?

A. Yes, if invited by the students, unless the school adopts a policy barring all "non-school persons." However, the nonschool persons cannot, in fact, be running the student group. Nonschool persons may not direct, conduct, control, or regularly attend activities of student groups. A school may decide not to permit any outside resource people to attend any club meetings, or it may determine how many times during a school year an outside resource person may attend any club meetings, or it

may limit the number of outside resource people who may attend a single meeting.

(15) Q. Can a teacher or other employee be required to be present at a student meeting if that person does not share the beliefs of the students?

A. No. No school employee can be required to attend a meeting "if the content of the speech at the meeting is contrary to the beliefs" of that employee. However, if a school establishes a limited open forum, it is responsible for supplying a monitor for every student group meeting if a monitor is required.

(16) Q. Does the assignment of a teacher to a meeting for custodial purposes constitute "sponsorship of the meeting"?

A. No. Sec. 803(2).

(17) Q. Does the expenditure of public funds for the incidental cost of providing the space (including heat and light) for student-initiated meetings constitute sponsorship?

A. No. Sec. 802(d)(3).

(18) Q. If a school pays a teacher for monitoring a student religious club, does that constitute "sponsorship"?

A. Congressional debate apparently took for granted that payment of a school-required monitor for any club was an "incidental cost of providing the space for student-initiated meetings." Sec. 803(d)(3). However, there are some who maintain that schools may not expend money to monitor religious clubs in view of the Establishment Clause.

(19) Q. Does the use of school media to announce meetings of noncurriculum related student groups constitute "sponsorship" of those meetings?

A. The Act does not directly address this issue. If only information about all meetings is given, the use of school media—the public address system, the school paper, the official bulletin board—may not constitute sponsorship of meetings. However, schools should be cautioned that the Act forbids their promotion of these meetings, and the singling out of one or a few of them for special attention would be promoting them. Because a basic precept of the Act is student-initiation, each noncurriculum related student group is responsible for its own promotion.

(20) Q. Do school authorities retain disciplinary control?

A. Yes. The Act emphasizes the "authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Sec. 802(f). Furthermore, the school must provide that "the meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school." Sec. 802(c)(4). These two provisions do not authorize a school to prohibit certain student groups from meeting because of administrative inconvenience or speculative harm. For example, a group cannot be barred at a particular school because a similar student group at a different school has generated difficulties.

(21) Q. What about groups which wish to advocate or discuss changes in existing law?

A. Students who wish to discuss controversial social and legal issues such as the rights of the unborn, drinking age, the draft and alternative lifestyles may not be barred on the basis of the content of their speech. However, the school must not sanction meetings in which unlawful conduct occurs. Sec. 802(d)(5).

(22) Q. What if some students object to other students meeting.

A. The rights of the lawful, orderly student group to meet are not dependent upon the fact that other students may object to the ideas expressed. All students enjoy free speech constitutional guarantees. It is the school's responsibility to maintain discipline in order that all student groups be afforded an equal opportunity to meet peacefully without harassment. The school must not allow a "hecklers' veto."

(23) Q. What about so-called "hate" groups?

A. Student groups which are unlawful, Sec. 802(d)(5), or which materially and substantially interfere with the orderly conduct of educational activities, Sec. 802(c)(4), can be excluded. However, a student group cannot be denied equal access because its ideas are unpopular. Freedom of speech includes ideas the majority may find repugnant.

(24) Q. Must noncurriculum related student groups have an open admissions policy?

A. The Act does not address this issue. It is an open constitutional question whether a requirement that all group meetings during the limited open forum be open to all students without regard to race, gender, religion or national origin could be enforced against a group with restrictive policies. The answer to this question may in part turn on whether a State's civil rights laws require an open attendance policy.

(25) Q. What may a school do to make it clear that it is not promoting, endorsing or otherwise sponsoring noncurriculum related student groups?

A. A school may distribute a disclaimer which plainly states that in affording such students groups an opportunity to meet it is merely making its physical facilities available.

(26) Q. What happens if a school violates The Equal Access Act?

A. The law contemplates a judicial remedy. An aggrieved person could bring suit in a U.S. district court to compel the school to observe the law. No cutoff of federal funds is involved. Sec. 802(e).

(27) Q. Does the Act have any impact on the after-hours rental of school facilities to non-student groups?

A. No. Such rentals would continue to be governed by local regulations and general constitutional principles.

(28) Q. What about situations not addressed in this explanation?

A. At the present time, indications are that the Department of Education will not issue regulations with respect to this Act. Questions about its implementation may arise. The groups below are available for advice:

American Association of School Administrators, 1801 N. Moore, Arlington, VA 22209, 703-528-0700, Bruce Hunter.

American Civil Liberties Union, 600 Pennsylvania Ave., S.E., Washington, DC 20003, 202-544-1681, Barry W. Lynn.

American Jewish Congress, Commission on Law and Social Action, 15 E. 84th St., New York, NY 10028, 212-879-4500, Marc Stern, Lois Waldman.

Christian Legal Society, P.O. Box 1492, Springfield, VA 22151, 703-941-3192, Sam Ericsson.

National Association of Evangelicals, 1430 K Street, NW, Washington, DC 20005, 202-628-7911, Forest Montgomery.

In addition to the above groups, the following also participated in the formulation of these guidelines.

Americans for Democratic Action, Mitch Edelstein, Baptist Joint Committee on Public Affairs, John W. Baker, General Conference of Seventh-day Adventists, Gary M. Ross, National Educational Association, Joel Packer.

The following groups are in general agreement with the guidelines:

American Federation of Teachers, Catholic League for Religious and Civil Rights, Christian Educators Association, National Council of the Churches of Christ in the U.S.A., People for the American Way.

Additional groups may become signators in the near future.

October, 1984.

Supreme Court, U.S.
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No. 89-641

In The

Supreme Court of the United States

October Term, 1989

RICHARD GARNETT, ET AL.,

Petitioners,

v.

RENTON SCHOOL DISTRICT NO. 403, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under the First Amendment or the Equal Access Act (20 U.S.C. § 4071 *et seq.*) ("EAA"), public high school officials are required to officially sanction and formally authorize a student-organized religious club to meet on school premises during noninstructional time where the avowed purpose of that club is to pray, read and discuss the Bible and share religious beliefs and where all other student groups at the school are curriculum-related.

2. Whether the EAA unconstitutionally violates the Establishment Clause by requiring secondary public schools to allow students to hold religious meetings on the school campus during or at times closely associated with the school day.

3. Whether, under Articles I (Section 11) and IX (Section 4) of the Washington Constitution, public high school officials are required to refuse to officially sanction and formally authorize a student-organized religious club to hold religious meetings on the school campus during or at times closely associated with the school day.

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No. 89-641

In The

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RICHARD GARNETT, ET AL.,

Petitioners,

v.

RENTON SCHOOL DISTRICT NO. 403, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Defendants-Respondents ("Defendants") refused to allow the religious club of Plaintiffs-Petitioners ("Plaintiffs") to meet on the premises of Lindbergh High School ("LHS") with the official sanction and formal authorization of the Board of Directors ("the Board") of Renton School District No. 403 ("the School District"). The avowed purpose of Plaintiffs' religious club is to pray,

read and discuss the Bible and share religious beliefs. (C.R. 1, 41)[1]

The School District is a government entity that receives federal financial assistance and is managed by the Board and the District Superintendent. (C.R. 1, 41) The School District oversees the operation of LHS, a public secondary school in Renton, Washington. (E.R. 3)[2]

Following Congress' enactment of the EAA, the Board adopted Policy 6470 (E.R. 128) with the advice of a Citizens Advisory Committee. (Kohlwes depo. pp. 32, 36-37)[3] Policy 6470 sets forth guidelines or "criteria" that are used by the Board to determine whether to approve co-curricular activities. (Bumgarner depo. p. 15; Kohlwes depo. p. 37) Policy 6470 provides in pertinent part:

> The criteria to be used for approving co-curricular activities should include but not be limited to:
>
> 1. the purposes and/or objectives shall be an extension of a specific program or course offering,
>
> 2. the activity shall be acceptable to the community,

---

[1] References to "C.R." are to the Clerk's Record in the District Court.

[2] References to "E.R." are to the Excerpt of Record filed with the Court of Appeals.

[3] Deposition transcripts are included in the Record in this matter pursuant to Stipulation. (C.R. 90; see also Clerk's Record entry "**" of January 25, 1988) However, because those depositions were not given separate numbers, they will be referred to by the name of the deponent.

> 3. the activity shall have carry-over values for lifetime activities,
>
> 4. the group shall be supervised by a qualified employee,
>
> 5. the cost of the activity must not be prohibitive to student or District,
>
> 6. the activity must comply with Title IX requirements,
>
> 7. the activity must take place on school premises unless approved in advance by the school principal, and
>
> 8. the activity must not be secretive in nature.

[E.R. 128; Plaintiffs' Appendix ("Pet. App.") 5a-6a] Policy 6470 also states that the District "does not offer a limited open forum." (*Id.*)

Pursuant to Policy 6470, Defendants provide LHS students the opportunity to meet as officially recognized and formally authorized student clubs. Those clubs may freely use school facilities and meet on school premises during noninstructional time – before or after actual classroom instruction. (E.R. 3) Pursuant to Policy 6470, each club or group must be supervised by a School District employee.[4] In order to meet as an officially

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[4] Each club or group has an assigned faculty advisor who periodically may lead the activities of the club. Those advisors may specifically perform instruction during group meetings. The advisor evaluates participation in club activities to determine whether a student should continue participating in a club. On any given day, a faculty advisor could assume a leadership position in any of the clubs. The advisors consult with the students in setting the agenda for the clubs. (Barker depo. pp. 45, 47-48, 54, 56)

recognized and formally authorized student group or club, it must either be listed on the School District's Master List of Clubs, Activities and Trips (the "Master List") (E.R. 88-92, 128) or be given interim approval to meet by the Superintendent, subject to the Board's decision whether to add the group or club to the Master List.[5]

The primary objective of Policy 6470 is to provide students "a broad offering of purposeful learning experiences" (E.R. 128) in order to achieve broad learning objectives. (Kohlwes depo. pp. 32, 36-37) Policy 6470 allows the Board to identify and approve "those activities which are consistent with the [School] District's curricular objectives" but are not formal classroom instruction activities. (E.R. 128)

Another objective of Policy 6470 is to develop students' character, democratic growth and understanding of others. (Barker depo. p. 20) Those broad student learning objectives, and the co-curricular activities designed to achieve them, are part of the actual secondary school curriculum in that there is a direct relationship between participation and such co-curriculum activities in classroom performance. Indeed, students involved in co-curricular activities have consistently demonstrated a tendency to do better in school. (Bumgarner depo. pp. 6, 11, 15; E.R. 18)

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[5] Of the 48 clubs and activities on the 1986-1987 Master List (E.R. 88-92), Plaintiffs challenge 15 as "noncurriculum-related groups." (E.R. 17) Both the District Court and the Court of Appeals, however, ruled that all 15 of the challenged clubs are related to the LHS curriculum and therefore cannot be considered "noncurriculum-related" under the EAA. (Pet. App. 15a-16a, 24a)

Plaintiffs are members or former members of a student religious club initially known as "Club Action" and later called "High-Tops." Plaintiffs applied to the School District for permission to meet on the LHS campus as an officially recognized and formally authorized club. (C.R. 1, 41) Their avowed purpose is to pray, read and discuss the Bible and share religious beliefs. (*Id.*) Pursuant to Policy 6470, the School District denied that request because the club was not curriculum-related and also because the club meetings would violate the Establishment Clause and also Articles I (Section 11) and IX (Section 4) of the Washington Constitution. (E.R. 4, 14)

Plaintiffs filed a lawsuit in the United States District Court for declaratory and injunctive relief to compel Defendants to allow Plaintiffs' club to meet on LHS premises. The District Court consolidated argument on Plaintiffs' Motion for Preliminary Injunction with trial on the merits. (C.R. 70) The District Court denied Plaintiffs' Motion, dismissed Plaintiffs' claim under the EAA and found that none of the challenged clubs are "noncurriculum-related." (Pet. App. 20a-38a) Because the mandatory provisions of the EAA had not been triggered, the Court did not address the constitutionality of the EAA. (*Id.* at 22a, 35a) The District Court also rejected Plaintiffs' constitutional arguments and ruled that, had Defendants allowed Plaintiffs' religious club to meet, Defendants would have violated the Establishment Clause and also Articles I (Section 11) and IX (Section 4) of the Washington Constitution. (*Id.* at 30a-37a)

The Court of Appeals affirmed the Judgment of the District Court and ruled that, had Defendants allowed Plaintiffs' religious club to meet on the LHS campus

Defendants would have violated the second and third prongs of the three-part Establishment Clause test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), in that such permission would have the primary effect of advancing religion and would impermissibly entangle church and state. (Pet. App. 8a-12a)

The Court of Appeals also rejected Plaintiffs' challenge under the Free Speech Clause of the First Amendment. (*Id.* at 12a-14a) The Court of Appeals ruled that because LHS is not a "limited public forum," Defendants may limit student expression in any reasonable way and that Policy 6470 is not unreasonable on its face nor were Defendants "disingenuous" in its application. (*Id.* at 12a-13a) In addition, the Court of Appeals ruled that, because of the Establishment Clause constraints, Defendants were required to refuse to allow Plaintiffs' religious club to meet. (*Id.* at 13a)

The Court of Appeals also distinguished *Widmar v. Vincent*, 454 U.S. 263 (1981) (where a religious group was allowed to meet on the campus of a college that allowed a diverse range of student groups to meet) because of "the impressionability of young [high school] students, compulsory attendance laws that make [high school] students a captive audience, and the role of public schools in inculcating democratic ideals." (Pet. App. 10a-11a, 13a)

Based on its independent review of the Record, the Court of Appeals further ruled that the EAA does not apply because LHS did not provide a "limited open forum." (*Id.* at 14a-16a) The Court of Appeals ruled that all of the challenged clubs at LHS "are related to the school's curriculum." (*Id.* at 15a) The Court of Appeals

recognized that the challenged clubs "are supervised by faculty advisors and are so closely related to course work or are so integral a part of the traditional and official school programs that they could not reasonably be termed 'noncurriculum related.' " (*Id.* at 15a-16a) The Court of Appeals also ruled that LHS and the District "had considered instructional goals and, in accordance with a written policy, made the [challenged] clubs a part of [LHS's] curriculum." (*Id.* at 16a)

ARGUMENT

Defendants were required by the Establishment Clause and also by the Washington Constitution to deny Plaintiffs' religious club permission to meet in a classroom at LHS at a time closely associated with the school day. The EAA does not apply to this matter in that all school clubs challenged by Plaintiffs are "curriculum-related." Moreover, the EAA is unconstitutional under the Establishment Clause.

The decisions of the District Court and Court of Appeals in this matter are correct for the following reasons:

1. The Establishment Clause prohibited Defendants from authorizing Plaintiffs' religious club to meet at LHS. The clear mandate of the Establishment Clause outweighed Plaintiffs' limited free speech rights at the closed forum at LHS and required that Defendants deny permission for Plaintiffs' religious club to meet on campus.

2. The Court of Appeals correctly ruled that, because Defendants maintain a "closed forum" at LHS, neither the EAA nor the Free Speech Clause required Defendants to authorize Plaintiffs' religious club to meet at LHS. Defendants' decision also was compelled by the Washington Constitution. Moreover, even if the EAA were to apply in this matter, it is unconstitutional under the Establishment Clause.

Each of those reasons will now be discussed.

1. Under the Establishment Clause, Plaintiffs' constitutional rights were not violated.

This matter involves Defendants' refusal to officially sanction and formally authorize Plaintiffs' religious club and Defendants' attendant denial of permission for Plaintiffs' club to meet on school premises with a faculty advisor in attendance at times closely associated with the school day in order to pray, read and discuss the Bible and share religious beliefs. Thus, this matter involves a student request for official sponsorship and active promotion of religious student expression. As correctly recognized by the Court of Appeals, but ignored by Plaintiffs, in this context Plaintiffs' limited free speech rights have to be balanced against the mandate of the Establishment Clause requiring avoidance of official sponsorship and advancement of religion. (Pet. App. 7a-14a)

In balancing these competing constitutional interests, the Court of Appeals correctly concluded that the mandate of the Establishment Clause prohibits the sanctioning of Plaintiffs' religious club. The Court of Appeals

recognized the special characteristics of the public secondary school environment that require vigilance in avoiding the injection of religion into those schools – compulsory attendance laws, the role of public schools in inculcating democratic ideals into students and, most significantly, the impressionability of public secondary school students.[6]

Because of this unique role played by public education in our society, this Court has consistently disallowed the divisive influence of religion in public secondary schools. *See, e.g., Edwards v. Aquillard,* 482 U.S. 578 (1987); *Wallace v. Jaffree,* 472 U.S. 38 (1985); *Stone v. Graham,* 449 U.S. 39 (1980); *Abington School District v. Schempp,* 374 U.S. 203 (1963); *Engel v. Vitale,* 370 U.S. 421 (1962).

This Court has repeatedly recognized the vast differences between a high school and a university. *See Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 98 L. Ed. 2d 592, 602-03 (1988); *Edwards v. Aquillard, supra,* 482 U.S. at 583-85; *Widmar v. Vincent, supra.* While this Court in *Widmar, supra,* held that a religious group was allowed to meet on the campus of a college that allowed a diverse range of student groups to meet, the students were adults rather than impressionable high school students. This Court has repeatedly recognized that the impressionability of secondary school students is a crucial factor when applying the Establishment Clause prohibition against the advancement of religion in public secondary

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[6] The Court of Appeals also correctly ruled that LHS "is not a First Amendment limited public forum." (Pet. App. 12a)

schools. *Edwards v. Aquillard, supra,* 482 U.S. at 583-85; *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986); *Widmar v. Vincent, supra,* 454 U.S. at 274 n. 14; *Tilton v. Richardson,* 403 U.S. 672, 685-86 (1971). Accordingly, the Court of Appeals correctly ruled that "the impressionability of young students" is a crucial factor in this matter. (Pet. App. 10a-11a)

The Court of Appeals correctly recognized that, "[w]hen the explicit Establishment Clause proscription against prayer in the public schools is considered, the protections of political and religious speech are inapposite." (Pet. App. 13a) Indeed, with only one exception, every federal appellate court that has examined similar religious group access claims in public secondary or elementary schools has held that the school district's Establishment Clause concerns outweigh a plaintiff's free speech concerns and that, therefore, access is prohibited.[7]

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[7] *See Bell v. Little Axe Independent School Dist. No. 70,* 766 F.2d 1391 (10th Cir. 1985); *Nartowicz v. Clayton County School Dist.,* 741 F.2d 538 (3rd Cir. 1984), *vacated on other grounds* 475 U.S. 534 (1986); *Lubbock Civ. Lib. Union v. Lubbock Ind. Sch. Dist.,* 669 F.2d 1038 (5th Cir. 1982); *cert. den.* 459 U.S. 1159 (1983); *Collins v. Chandler Unified School Dist.,* 644 F.2d 759 (9th Cir.), *cert. den.* 454 U.S. 863 (1981); *Brandon v. Board of Ed. of Guilderland Cent. Sch.,* 635 F.2d 971 (2nd Cir. 1980); *see generally Jager v. Douglas County School Dist.,* 862 F.2d 824 (11th Cir.), *cert. den.* 109 S. Ct. 2431 (1989); *but see Mergens v. Board of Educ. of Westside Com. Schools,* 867

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Plaintiffs' arguments are flawed in that the Record clearly establishes that Plaintiffs are seeking the sponsorship of the School District. Plaintiffs are requesting the use of school facilities for regularly scheduled religious activities at a time closely associated with the school day. The meetings of Plaintiffs' religious club would have to be attended by a School District employee. Plaintiffs are seeking the official label of a formally authorized club. Indeed, the Court of Appeals correctly ruled in this matter that Defendants did not prohibit Plaintiffs "from discussing religion at school." (Pet. App. 14a) There is not a scintilla of evidence that Defendants *ever* discouraged Plaintiffs from sharing their religious faith with other students or discouraged anyone from attending or being involved in Plaintiffs' religious club. Defendants merely refused to officially authorize Plaintiffs' religious club or allow the club to formally use school facilities such that

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F.2d 1076 (8th Cir. 1989), *cert. granted* 109 S. Ct. 3240 (1989) [*Mergens* is similar to this matter in that public secondary school students were seeking the approval of the school district to meet as a religious group. The Court of Appeals ruled on the facts presented there (despite citing the decision of the Court of Appeals in this matter) that the school district allowed "noncurriculum-related" clubs to meet on the campus. Therefore, the Court ruled that the EAA applied and forbade discrimination against the students' proposed club on the basis of the club's religious nature. The "curriculum-relatedness" of a student group is essentially a factual inquiry that must be made on a case-by-case basis. Thus, the Court's conclusion in *Mergens* regarding the EAA is not instructive to this matter. In this matter, the Court of Appeals correctly ruled, after independently reviewing the Record, that all of the challenged clubs are "curriculum-related." (Pet. App. 14a-16a)].

students, parents or the public would perceive that Plaintiffs' religious club had the imprimatur of the School District.

Thus, Plaintiffs are clearly seeking school sponsorship for their religious activities. That is why the District Court and Court of Appeals correctly ruled that the Establishment Clause prohibits Defendants from sanctioning Plaintiffs' religious club.

2. The Court of Appeals correctly ruled that, because Defendants maintain a "closed forum" at LHS, neither the EAA nor the Free Speech Clause required Defendants to authorize Plaintiffs' religious club to meet at LHS. Defendants' decision also was compelled by the Washington Constitution. Moreover, even if the EAA were to apply in this matter, it is unconstitutional under the Establishment Clause.

The Court of Appeals correctly ruled that, because Defendants maintain a "closed forum" at LHS, neither the EAA nor the Free Speech Clause required Defendants to authorize Plaintiffs' religious club to meet at LHS. (Pet. App. 12a-16a) That ruling was based on the Court's thorough review of the language and legislative history of the EAA, Policy 6470 in its entirety and an independent review of the Record.

The crucial issue under the EAA is whether Defendants allowed "noncurriculum-related" student groups to use school facilities such that LHS became a "limited open forum" under the EAA. The corollary and related issue under the First Amendment is whether Defendants,

by "policy or practice," opened LHS to indiscriminate use.[8]

Of approximately 50 clubs on the School District's Master List of approved and authorized student clubs, Plaintiffs challenged 15 and contended that those 15 clubs are "noncurriculum-related." The Court of Appeals, as did the District Court, correctly ruled that all of the challenged clubs at LHS "are an extension of the courses and programs of the [D]istrict" and "are supervised by faculty advisers and are so closely related to course work or are so integral a part of the traditional and official school programs" that Defendants retained a "closed forum" at LHS. (Pet. App. 13a, 15a-16a)

In reaching that conclusion, the Court of Appeals first analyzed Policy 6470. Examining the entire Policy, the Court correctly ruled that the Policy is not unreasonable on its face nor are Defendants "disingenuous" in applying it. (*Id.* at 13a) All of the 15 clubs challenged by Plaintiffs are extensions of curricular courses and programs at LHS, while Plaintiffs' religious club is not. The Court of Appeals correctly concluded that in authorizing the challenged clubs, Defendants considered instructional goals and, in accordance with the written Policy, specifically made those clubs a part of the curriculum

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[8] In *Hazelwood School District v. Kuhlmeier, supra,* 98 L. Ed. 2d at 602-04, this Court held that a "public forum" in a high school is created *only if* school authorities by "policy or practice" open school facilities for "indiscriminate use" and there must be a finding of a "clear intent to create a public forum." There clearly is no such policy or practice by the School District in this matter.

at LHS. (*Id.* at 15a-16a) Therefore, Defendants correctly denied authorization for Plaintiffs' religious club to meet, as the District Court and Court of Appeals held.

In concluding that none of the challenged clubs are "noncurriculum-related" – a term that is not defined in the EAA – the Court of Appeals also examined the legislative history of the EAA and correctly ruled that Congress did not intend to depart from the traditional notion that school districts retain broad discretion and authority to define their curriculum. (Pet. App. 15a) However, the Court correctly concluded that it could not completely defer to Defendants' determination. Thus, the Court independently reviewed the Record and correctly ruled that "all clubs at [LHS] are related to [LHS's] curriculum." (*Id.*) Therefore, the Court correctly concluded that the EAA does not apply to this matter.

Even if a "limited open forum" was somehow created by Defendants at LHS, the EAA cannot compel Defendants to allow Plaintiffs' religious club to meet on school premises in violation of the Washington Constitution, as the District Court correctly ruled.[9]

The District Court ruled that "[t]he mandatory provisions of the EAA may not be applied in Washington State to permit religious organizations to meet on school

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[9] This issue was raised and briefed by Defendants in their Appellees' Brief filed with the Court of Appeals (at 23-29). However, because the Court of Appeals ruled that the EAA did not apply, it did not reach that issue.

premises owing to provisions of this state's constitution[10] and relevant case law construing their application." (Pet. App. 31a) The District Court held that the Washington Constitution "requires a far stricter separation of church and state than the federal constitution" (*id.*), and correctly concluded:

> Even if [LHS] had created a 'limited open forum,' and even with the neutral operation of the EAA allowing students to meet on school premises but without school sponsorship, under Washington's constitutional law such meetings would (1) tend to introduce sectarian influence into [LHS] and (2) would result in an impermissible appropriation of public money or property for a religious purpose. The EAA itself provides that a state need not break its own laws in order to observe EAA requirements.

(*Id.* at 37a)

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[10] The District Court correctly ruled that if Plaintiffs were granted their requested relief, Defendants would be compelled to violate two distinct provisions of the Washington Constitution – Article I, Section 11, and Article IX, Section 4.

Article I, Section 11, provides in pertinent part: "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment." That ban on the use of public funds for religious purposes is, as the District Court noted, "absolute and without exception." (Pet. App. 33a) *See Perry v. School District No. 81*, 54 Wn.2d 886, 344 P.2d 1036 (1959); *State Ex. Rel. Dearle v. Frazier*, 102 Wn. 369, 173 P. 35 (1918).

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The District Court correctly concluded that the "EAA does not require the Renton School District to permit an unconstitutional use of school property." (*Id.* at 34a) In reaching that conclusion, the Court looked to the language of the EAA, which provides in pertinent part that "[n]othing in this subchapter shall be construed to authorize the United States or any State or political subdivision thereof . . . to sanction meetings that are otherwise unlawful [or] . . . to abridge the constitutional rights of any person." 20 U.S.C. § 4071 (d) (5) and (7).

Congress, in considering equal access proposals, surely was aware of the provisions of the Washington Constitution that mandate absolute separation between government and religion. Several months before passage of the EAA, Senator Gorton of Washington drew upon his knowledge of the Washington Constitution to convince his colleagues of the importance of respecting states' rights and state constitutional provisions when considering passage of a constitutional amendment that would have required equal access. Specifically, he stated that "nothing in [the amendment] . . . would undermine those

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Article IX, Section 4, provides: "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." As noted by the District Court (Pet. App. 31a-32a), the Washington Supreme Court has construed that constitutional provision as an express and absolute prohibition of the allowance of *any* sectarian influence in public schools. *Weiss v. Bruno*, 82 Wn.2d 199, 509 P.2d 973, 978 (1973).

State constitutional provisions." 130 Cong. Rec. S2883 (Daily ed. March 20, 1984).

Accordingly, the plain language of the EAA makes it clear, as the District Court correctly concluded (Pet. App. 34a-35a), that Congress did not intend to preempt the Washington Constitution. The District Court correctly ruled that "[t]he conclusion is unavoidable that if Plaintiffs were to obtain their requested relief, the meetings of their religious club on school premises would amount to at least a slight benefit to religion, a benefit that is prohibited by Washington's Constitution." (Pet. App. 34a)

Finally, the EAA unconstitutionally violates the Establishment Clause by requiring secondary public schools to allow students to hold religious meetings on the school campus during or at times closely associated with the school day.[11]

The Establishment Clause was intended to erect "a wall of separation between church and state" [*Everson v. Board of Education*, 330 U.S. 1, 15-16 (1947)], a wall that "must be kept high and impregnable" [*Illinois v. Board of Education*, 333 U.S. 203, 212 (1947)]. In erecting that wall, the founders of the constitution recognized the wisdom of absolute separation between church and state – "complete separation between the state and religion is best for the state and best for religion." *Illinois v. Board of Education, supra*, 333 U.S. at 231-32; *see Zorach v. Clauson*, 343

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[11] While the constitutionality of the EAA was raised before the District Court and Court of Appeals, neither court addressed that issue because of the respective rulings by the courts that Defendants' conduct did not trigger application of the EAA. (Pet. App. 16a, 35a)

U.S. 306, 312 (1952); *Everson v. Board of Education, supra,* 330 U.S. at 26-27.

This Court's decisions[12] make it clear that the origin of religious activity – whether that activity is student or state-initiated – is irrelevant when determining whether an Establishment Clause violation has occurred. The crucial determination is the extent of government sponsorship or support of the activity.

Plaintiffs' constitutional analysis focuses primarily on whether Defendants violated Plaintiffs' free speech and free exercise rights and fails to balance those rights against the Establishment Clause proscription against government entanglement with religion. The crucial issue is whether the EAA, in requiring Defendants to allow Plaintiffs' religious club to meet at LHS, would violate the Establishment Clause.

When analyzed under the three-part test set forth in *Lemon v. Kurtzman, supra,* 403 U.S. at 612-13, the EAA is unconstitutional because (1) it has an impermissible religious purpose rather than a secular purpose, (2) its principal or primary effect advances religion, and (3) it fosters excessive government entanglement with religion.

In the coercive high school setting with compulsory attendance laws, a congressionally-mandated policy that allows students to engage in voluntary religious practices impermissibly creates the appearance to impressionable students that the state has placed its imprimatur on those

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[12] *See, e.g., Edwards v. Aquillard, supra; Wallace v. Jaffree, supra; Stone v. Graham, supra; Abington v. Schempp, supra; Engel v. Vitale, supra; Illinois v. Board of Education, supra.*

religious practices. Also, teacher or faculty monitoring, which is contemplated by the EAA and is required pursuant to Policy 6470, would excessively entangle government and religious affairs, as would the fact that, under Policy 6470, Defendants would have to recognize and place Plaintiffs' religious club on the Master List in order for the club to be allowed to meet.

CONCLUSION

This Court should deny Plaintiffs' Petition for Writ of Certiorari in that the decision of the Court of Appeals is correct for the reasons discussed above.

Defendants, however, acknowledge that this case presents issues substantially similar to those presented in *Mergens v. Board of Educ., supra*, in which this Court has granted certiorari [109 S.Ct. 3240 (1989) (No. 88-1597)]. Therefore, if this Court grants certiorari in this matter, Defendants request that this Court accept briefs on the merits. There are issues and arguments (*e.g.*, the impressionability of high school students, the applicability of the Washington Constitution and the unconstitutionality of the EAA) that have not been raised or discussed in *Mergens*. Also, if this Court grants certiorari, this Court should hear oral argument in this matter at the same time that it hears the oral argument in *Mergens*.

Respectfully submitted,

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